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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-5394

JERRY LANE JUREK,

Petitioner,

- v -

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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INDEX

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT	7
HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW	19
REASONS FOR GRANTING THE WRIT	21
I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES	21
A. The Perpetuation of Arbitrary Selectivity Under the New Texas Capital Punishment Statutes	21
1. Pre-Sentence Selective Mechanisms	25
i. Prosecutorial Discretion	25
ii. Jury Discretion	31
2. Sentencing Discretion	38
3. Executive Clemency	45
B. The Inconsistency of the Death Penalty with Contemporary Standards of Decency	49
II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION AT TRIAL OF PETITIONER'S WRITTEN CONFESSIONSWAS CONSISTENT WITH FEDERAL STANDARDS PROTECTING RIGHTS SECURED BY THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES	50
CONCLUSION	53

TABLE OF CASES

	Page
Alvarez v. Nebraska, 408 U.S. 937 (1972)	45
Armentrout v. State, 515 S.W.2d 297 (Tex. Cr. App. 1974)	35
Bech v. Ohio, 379 U.S. 89 (1964)	52
Billingsley v. New Jersey, 408 U.S. 934 (1972)	45
Blocker v. State, 10 S.W. 439, 27 Tex. App. 16 (1889).	34
Branch v. Texas, 408 U.S 238 (1972)	21
Burnett v. State, 53 Cr. R. 515, 112 S.W. (1908).	35
Clay v. State, 70 Cr.R. 451, 157 S.W. 164 (1913)	29
Crowder v. State, 78 Tex. Cr. R. 344, 180 S.W. 706 (1915).	44
Davis v. Connecticut, 408 U.S. 925 (1972)	45
Dillard v. North Carolina, No. 73-6875 (June 11, 1974).	49
Duling v. Ohio, 408 U.S. 936 (1972)	45
Ellison v. State, 432 S.W.2d (Tex. Cr. App. 1968)	47
Ex parte Black, 457 S.W.2d 919 (Tex. Cr. App. 1970)	30

	Page
Ex parte Rusk, 128 Cr. R. 865, 79 S.W.2d 865 (1935)	29
Fikes v. Alabama, 352 U.S. 191 (1957)	51, 52
Freeman v. State, 317 S.W.2d 726 (Tex. Cr. App. 1958)	36, 42
Furman v. Georgia, 408 U.S. 238 (1972)	21,22,47, 48,49
Gallegos v. Nebraska, 342 U.S. 55 (1951)	51
Gatlin v. State, 86 C.R. 399, 217 S.W. 689 (1919)	35
Gentry v. State, 68 Cr. R. 567, 152 S.W. 635 (1913)	29
Guinn v. United States, 238 U.S. 347 (1915)	22
Hargrove v. State, 501 S.W.2d 878 (Tex. Cr. App. 1973)	34
Henry v. United States, 361 U.S. 89 (1964)	52
Herron v. Tennessee, 408 U.S. 939 (1972)	45
Hovila v. State, No. 49,396 (Opinion dated April 30, 1975)	39
Jenkins v. Beto, 442 F.2d 655 (C.A. 5, 1971)	30
Johnson v. State, 216 S.W.2d 573 (Tex. Cr. App. 1948)	44
Jurek v. State, 552 S.W.2d 934 (Tex. Cr. App. 1975)	2,20,39,42, 43,52,53

	Page
Lamberson v. State, 509 S.W.2d 328 (Tex. Cr. App. 1974)	44
Lane v. Wilson, 307 U.S. 268 (1939)	22,49
Lucky v. State, 495 S.W.2d 919 (Tex. Cr. App. 1973)	34
Ludwig v. State, 298 S.W.2d 166 (Tex. Cr. App. 1956)	44
Matheson v. State, 508 S.W.2d 77 (Tex. Cr. App. 1974)	35
McGautha v. California, 402 U.S. 183 (1971)	31
Miranda v. Arizona, 384 U.S. 436 (1966)	51
Moore v. Illinois, 408 U.S. 786 (1972)	45
Morales v. New York, 396 U.S. 102 (1969)	52
People v. Black, 367 Ill. 209, 10 N.E.2d 801 (1937)	45
People v. Morse, 36 Cal. Reptr. 201, 388 P.2d 33, 40 (1964)	41
People v. Sullivan, 345 Ill. 87, 177 N.E. 733 (1933)	45
Powell v. Alabama, 287 U.S. 45 (1932)	52
Salazar v. State, 131 S.W.2d 761 (Tex. Cr. App. 1939)	30
Simmons v. State, 504 S.W.2d 465 (Tex. Cr. App. 1974)	53

Page

Stanley v. State, 490 S.W.2d 828 (Tex. Cr. App. 1973). 46, 47

State v. Bell, Jefferson County District Ct., No. 31679 (December 27, 1974) 21

State v. Bird, Cameron County District Ct., No. 50213 (September 5, 1974) 21

State v. Boulware, Dallas County Criminal Ct., No. C74-1299 QK (May 4, 1974) 21

State v. Brock, Harris County District Ct., No. 213720 (February 4, 1975) 21

State v. Burns, Ector County District Ct., No. B-7459 (February 22, 1974). 21

State v. Castro, Bexar County District Ct., No. 74CR2869A 21

State v. Collins, McLenna County District Ct., No. 75-9-C (February 7, 1975). 21

State v. Cuevas, Harris County District Ct., No. 219833. 21

State v. Dowden, Harris County District Ct., No. 225,031 26,31

State v. Eaton, 19 Ohio St. 1[illegible]6, 249 N.E.2d 897 (1969) 45

State v. Freeman, Atascoso County District Ct., No. 5816 (April 22, 1974) 21

State v. Gholson, Bell County District Ct., No. 22412 (February 3, 1975). 21

State v. Hughes, Dallas County Criminal Ct., No. C74-10214HL (January 20, 1975). 21

Page

State v. Kleason, Travis County District Ct., No. 4846Z (June 10, 1975). 21

State v. Moore, Dallas County Criminal Ct., No. CT 43180PH (June 20, 1974). 21

State v. O'Bryan, Harris County District Ct., No. 220328 (June 4, 1975). 21

State v. Reynolds, 41 N.J. 163,195 A.2d 449 (1963) 45

State v. Robinson, Dallas County Criminal Ct., No. C74-3195 PQ (July 29, 1974). 21

State v. Ross, Bell County District Ct., No. 22411 (February 3, 1975). 21

State v. Skillern, Live Oak County District Ct., No. 1996 (March 1, 1975) 21

State v. Smith, Dallas County Criminal Ct., No. C73-12659 (March 27, 1974). 21

State v. Tudor, 154 Ohio St. 249 N.E.2d 385 (1950) 45

State v. White, Lubbock County District Ct., No. 15715 (January 12, 1975). 21

State v. Woodkins, Harrison County District Ct., No. 1581 (April 1, 1975) 21

Stein v. New York, 346 U.S. 156 (1952) 51

Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689 (1951). 45

	Page
Thompson v. State, 521 S.W.2d 621 (Tex. Cr. App. 1975).	35
Tomkins v. Missouri, 323 U.S. 485 (1944).	52
Trop v. Dulles, 356 U.S. 86 (1958)	49
Trotter v. State, 341 S.W.2d 923 (Tex. Cr. App. 1960).	35
Ward v. State, 68 Cr.R. 154, 151 S.W. 1073 (1912)	36
Watts v. Indiana, 338 U.S. 49 (1948)	51
Whan v. State, 485 S.W.2d 275 (1972), cert. denied 411 U.S. 934	47
Wiley v. State, 92 Cr. R. 395, 244 S.W. 538 (1922).	29
Witherspoon v. Illinois, 391 U.S. 510 (1968). . .	
Wong Sun v. United States, 371 U.S. 471 (1963). .	52
Woodruff v. State, 164 Tenn. 520, 51 S.W.2d 843 (1932)	45
Young v. State, 419 S.W.2d 864 (Tex. . . . . Cr. App. 1967)	28

OTHER AUTHORITIES

	Page
Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50 (1966)	30
BEDAU, ed., THE DEATH PENALTY IN AMERICA (1967)	40
BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974)	40,43,52
Black, Crisis in Capital Punishment, 31 MD. L. REV. 289 (1971)	37
CARDOZO, LAW AND LITERATURE (1931)	37
Dershowitz, Pretrial Detention, 57 AMERICAN BAR ASSOCIATION JOURNAL 560 (1971)	42
Ennis and Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 CALIF. L. REV. 693 (1974)	41
KALVEN and ZEISEL, THE AMERICAN JURY (1967). . . .	33
Neithercutt, Parole Violation Patterns and Commitment Offense, 9 JOURNAL OF RESEARCH IN CRIME AND DELIQUENCY 87 (1972).	
Note, Executive Clemency in Capital Cases, 39 N.Y.L.U. REV. 136 (1964)	47
Note, Prosecutorial Discretion 21 DE PAUL REV. 485 (1971-1972)	
PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS (1967)	30

Page

Steadman, Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry, 1 JOURNAL OF PSYCHIATRY AND LAW, 409 (1973). 41

UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1973 (1974). 48

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STATUTES

Conn. Gen. Stat. Ann., §53-10 (1967). 45

Former Texas Penal Code, Art. 1177 (Appendix, Vol. IV., Vernon's Texas Penal Code Ann. (1974). 4

Former Texas Penal Code, Art. 1183 (Appendix, Vol. IV, Vernon's Texas Penal Code Ann., (1974). 5, 27

Former Texas Penal Code, Art. 1190 (Appendix, Vol. IV, Vernon's Texas Penal Code Ann. (1974). 5, 27

Former Texas Penal Code, Art. 1256 (Appendix, Vol. IV, Vernon's Texas Penal Code Ann. (1974). 2, 22

Former Texas Penal Code Art 1257 (Appendix, Vol. IV, Vernon's Texas Penal Code Ann. (1974). 3,4,23,24

Page

N.J. Stat. Ann. §29:113-4 (1969). 45

Tenn. Code Ann., §39-2406 (1955). 45

Vernon's Texas Code of Crim. Procedure Ann. Art. 1.14 (1966). 25

Vernon's Texas Code of Crim. Procedure Ann. Art. 26.13 (1974 Supp.) 30

Vernon's Texas Code of Crim. Procedure Ann. Art. 32.02 (1966) 29

Vernon's Texas Code of Crim. Procedure Ann. Art. 37.071 (1974 Supp.). 5,23,24,39

Vernon's Texas Code of Crim. Procedure Ann. Art. 38.22 (1966). 51

Vernon's Texas Code of Crim. Procedure Ann. Art. 43.14 (1966). 6

Vernon's Texas Constitution Ann., Art. IV, Section 11 (1955) 45, 46

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

NO. 75-

JERRY LANE JUREK,

Petitioner,

- v -

STATE OF TEXAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF TEXAS

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered April 16, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Texas is reported at 522 S.W.2d 934 (Tex. Cr. App. 1975) and is set out as Appendix A hereto, pp. 1a-17a, infra.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

Rehearing of the issues decided by the April 16, 1975 order of the Texas Court of Criminal Appeals was denied on May 7, 1975. The time within which a petition for writ of certiorari might be filed was extended to September 5, 1975 by order of Mr. Justice Powell, dated July 30, 1975.

QUESTIONS PRESENTED

1. Does the imposition and carrying out of the sentence of death for the crime of murder under the law of Texas violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Was the admission at trial of petitioner's written confessions consistent with federal standards protecting rights secured by the Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Texas law:

Texas Penal Code, Article 1256. Murder.[1/]

> Whoever shall voluntarily kill any person within this state shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing.

Texas Penal Code, Article 1257[2/]

1/ These provisions of the Texas Penal Code, applicable on the date of the offense for which petitioner was convicted, are published in an Appendix to the current Penal Code, Vernon's Texas Penal Code Ann. Vol. IV, Laws Repealed by the Penal Code, 1973, effective January 1, 1974 (9174).

2/ "Article 1257 was superseded by Section 19.03 of the new Texas Penal Code, Acts 1973, 63rd Leg., Ch. 399, eff. January 1, 1974. Section 19.03 of the new Penal Code is substantially similar to Article 1257 of the old code." Jurek v. State, supra, 522 S.W.2d at 936-37, n.1.

"(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense.

(d) If one of the circumstances or conditions enumerated in Subsection (b) of this Article is charged in an indictment, the prospective jurors shall be informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged. No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Texas Penal Code, Article 1257(a).

In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances

going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed 5 years, the defendant shall have the benefit of the suspended sentence act.

Texas Penal Code, Article 1257(b).

In all cases tried under the provisions of this Act, it shall be the duty of the court to define "malice aforethought" and it shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought, they cannot assess the punishment at a period longer than 5 years, provided, however, that no offense committed prior to the taking effect of Chap. 274, etc. shall be affected hereby.

Texas Penal Code, Article 1257(c).

In all cases tried under the provisions of this Act it shall be the duty of the Court, where the facts present the issue of murder without malice, to instruct the jury that murder without malice is a voluntary homicide committed without justification or excuse under the immediate influence of a sudden passion arising from an adequate cause, by which it is meant such cause as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection, and in appropriate terms in the charge to apply the law to the facts as developed from the evidence.

Texas Penal Code, Article 1177. Kidnapping.

When any person is falsely imprisoned for the purpose of being removed from the State, or if a minor under the age of seventeen years for the purpose of being concealed or taken from the lawful possession of a parent or guardian, such false imprisonment is "kidnapping." If the person kidnapped to (sic) be under fifteen years of age, it is not necessary that there should be want of consent nor that there should be force in order to constitute kidnapping, and, in such a case, consent of such a minor shall be no defense. One guilty of kidnapping shall be confined in the State Penitentiary not less than Five nor more than Twenty-five years, or by fine not exceeding two thousand dollars.

Texas Penal Code, Article 1183. Rape.

> Rape is the carnal knowledge of a woman without her consent obtained by force, threats or fraud; or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent and with or without the use of force, threats or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of eighteen years other than the wife of the person with our without her consent and with or without the use of force, threats or fraud; provided that if she is fifteen years of age or over the defendant may show in consent cases she was not of previous chaste character as a defense.

Texas Penal Code, Article 1190. Attempt to rape.

> If it appear on the trial of an indictment for rape that the offense though not committed, was attempted by the use of force, threats or fraud, but not such as to bring it within the definition of assault with intent to commit rape, the jury may find the defendant guilty of an attempt to rape and assess the punishment of confinement in the penitentiary for any term of years not less than two.

Vernon's Texas Code of Criminal Procedure, Ann. Article 37,071 (1974).[3/]

> (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection may not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.
>
> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

3/ As amended, Acts. 1973, 63rd Leg., p. 1125, Ch. 426, Art. 3, Sec. 1, eff. June 14, 1973.

> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.
>
> (c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.
>
> (d) The court shall charge the jury that:
>
> (1) it may not answer any issue 'yes' unless it agrees unanimously; and
>
> (2) it may not answer any issue 'no' unless 10 or more jurors agree.
>
> (e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.
>
> (f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Verson's Texas Code of Criminal Procedure Ann., Article 43.14. (1966)

> Whenever the sentence of death is pronounced against a convict, the sentence shall be executed at any time before the hour of sunrise on the day set for the execution not less than thirty days from the day of sentence, as the court may adjudge, by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application and continuance of such current through the body of such convict until he is dead.

STATEMENT

This is a petition for a writ of certiorari to review the judgment of the Texas Court of Criminal Appeals, entered on April 16, 1973, rehearing denied May 7, 1975, affirming petitioner's conviction and sentence of death. Petitioner, Jerry Lane Jurek, a twenty-five-year old white man (Exhibits, p. 14)[5] was sentenced to death on February 2, 1974 (Documentary Record, p. 72) in the Twenty-Fourth District Court, Dewitt County, Texas, after having been found guilty of "murder while in the course of committing or attempting to commit kidnapping and/or forcible rape" (T. 1867).

The State's evidence included two statements obtained by police and prosecution personnel before the appointment of counsel.[6]

In the first it is stated that petitioner had known the victim, a ten year old daughter of a local police officer (T. 1562), for "about a month and a half"; that on the afternoon of the murder he had been riding "around" in a pick up truck with two friends, Richard Broz and Ricky Phillips, drinking beer and looking for a Shirley Kay Range, that Ms. Range was not found and petitioner dropped his friends off at Laake's pool hall and drove to the park. The statement continues as follows:

5/ The record before the Texas Court of Criminal Appeals consisted of a Transcript of proceedings, cited herein as "T."; an indexed collection of exhibits, cited herein as "Exhibits" and a documentary Record on Appeal, cited herein as "Documentary Record."

6/ The crime occurred on August 16, 1973 (T. 110); petitioner's first statement was given at 1:15 on the morning of August 18 (Exhibits, p. 1); the second was given at approximately 7:00 p.m. (T. 53) on the same date (Exhibits, p. 2).

> I seen Wendy Adams at the swimming pool and asked her if she wanted to go riding around and she said "Yes"; she crawled in the back of the pick up truck and I drove out to Hell's Gate Bridge. From the park I drove past the skating rink, turned right at the high school and came down the hill by the cemetary and went to the Yoakum Highway on what I think was Reuss Blvd. As I came on the Yoakum Highway, a big truck almost hit me; from there I drove out past where the old drive-in picture show used to be and turned off on a small road to the left and from there on out to Hell's Gate Bridge; I turned off the pavement to the right and drove down close to the river. We sat on the side of the truck and talked. Wendy was still dressed in her bathing suit that she'd had on when we left the park. Wendy told me that I shouldn't be drinking, and that I was just like my brother who drinks a lot; and she also told me that my nieces didn't have a good father because he didn't come home to see them much. I got mad at her and jerked her off the truck and grabbed Wendy around her throat and choked her to death; she tried to talk to me to get me to stop but I wouldn't listen; she was crying when I was choking her; several times while I was choking her she tried to tell me to stop but I was mad and just wouldn't listen to her. Finally she collapsed and fell to the ground as I'd been choking while we had both been standing. After she fell to the ground, I then picked her up and throwed her into the river. After I throwned Wendy in the river, she went down and then I saw her come back up for a moment and then she went back down under the water and I didn't see her come up again. The place where I threw Wendy into the river was up-river from the bridge and about as far up-river from the bridge as it is from the Court House to the jail house; also I remember that there was a fence fairly close to where I threw her in the river. When I started to choke her, she kicked at me to try to stop me and she kept hollering at mt to please stop, but I just kept on choking her till she couldn't fight back and then collapsed and fell to the ground. It was kinda hard to keep on choking her when she pleaded with me to stop, but I just kept on choking her till she fell to the ground; and her face had turned dark blue from my choking her.

The statement further reports that petitioner then drove back to town, picked up Ricky Phillips at the pool hall and picked up Richard Broz at his home, after which the three "rode around" until approximately 9:15 p.m. (Exhibits, p. 1).

The second statement was as follows:

> On August 18, 1973, I gave Robert Post a statement concerning the death of Wendy Adams who I choked and threw

into the river. In the statement that I gave him I did not tell the truth about the conversation I had with Wendy at the river and about the prior discussion about trying to find some girls to pick up and I now herein wish to correct that statement.

Earlier on Thursday, August 16, 1973, when Richard and Ricky and myself were riding around drinking beer we talked about getting some pussy. I talked about Shirley Kay Range and how I wanted to get with her and get some pussy. Ricky mentioned Kathy Prause, who is a lifeguard, and said he wanted to get with her. When I am with the guys I talk about beer and pussy.

When I took Wendy down to the river we were standing beside the truck outside on the driver's side. I asked her if she had ever had sex before and she said yes. I asked her if she wanted to have sex with me but she said no and started screaming and yelled "help" and "please don't kill me". So I started choking her. I put both hands on her throat and choked her. I reached forward and dug my thumbs into her throat beside her adam's apple. I was picking up on her and she was kicking and scratching and trying to holler. My thumbs got tired and I had to move them at times. I had her against the truck holding her up. I choked her quite awhile and she fell to the ground and I let go.

I let her lay on the ground a short time and then picked her up and carried her toward the river. I layed her on the log and crawled under the log and then picked her up and threw her in the river. There were two little pipes sticking out of the water when I threw her in. She went down and them came up once a long ways down the river and them went down again. She came up a second time a short ways later and was floating face up.

When I told Mr. Post in my earlier statement that Wendy and I talked about my relatives at the river I was not telling the truth and I want to clear this up. After I threw her in the river I drove into town and got another six pack at Miss Kitty's, then picked up Ricky at Laake's pool hall, he was standing in front. I told him all I done was to get some beer and then we picked up Richard.

Everything else I have told Mr. Post in my prior statement is true and correct and I do not wish to change it.7/

7/ Portions of the statements which the prosecution failed to present were presented on petitioner's motion (T. 1461-2).

(Exhibits, p. 2).

Richard Broz, age 15 (T. 1463), testified that he and Ricky Phillips had been riding with petitioner on the afternoon of the crime, and that they had driven to the park (T. 1468) looking at girls (T. 1469). He stated that petitioner had tried to pick up three girls (T. 1470) whom Ricky Phillips had referred to as "too young" (id.), to which petitioner responded that they were just right and that we wanted to "get some pussy from them" (T. 1471). Richard Broz then testified that he and Ricky Phillips were dropped off at the pool hall (T. 1472) and that defendant said he was "going . . . back up to the park and get some girls and get some pussy" (T. 1473). Richard Broz next saw petitioner at 7:00 p.m. when he returned with Ricky Phillips (T. 1474-5). The three went riding again toward the river and across Hell's Gate Bridge upon which petitioner stopped and looked around, saying that he wondered if the banks were muddy (T. 1478-79).

Roxana Riddle, age 12 (T. 1483) testified that she and Branda Scott and Robin Burmeister had been riding bicycles on the day of the crime when they saw three boys in an old model blue and white pick up truck who tried to "run over" them (T. 1484), at which point she ran toward the swimming pool and the other two girls ran behind a baseball field (T. 1485). When asked if petitioner was one of the three boys, the witness replied "I think he was. He was the driver" (T. 1485). Roxana Riddle later joined the other two girls in the baseball field from which she reported that she saw the truck again thirty minutes later (T. 1486) with a blonde girl wearing a flowered bikini in the back screaming (T. 1487).

Brenda Scott, age 11 (T. 1495) and Robin Bermeister, age 12 (T. 1512) presented substantially similar testimony except that Brenda Scott indicated that when she saw the girl in the back of the truck she was looking directly through a knothole in the fence surrounding the ball park (T. 1504) and Robin Bermeister testified that they were outside the ball park, (1522) while Roxana Riddle had testified that they were "hiding" in a dugout (T. 1491) and saw the truck through the cracks in a fence which was some distance away (T. 1492). Robin Bermeister was "positive" that she had seen three boys in the truck on each of the two occasions (T. 1523) while Brenda Scott and Roxana Riddle saw only one (T. 1493, 1500). Although each of the three girls knew the victim (T. 1491, 1496, 1517), none of them recognized her as the person in the back of the truck (T. 1491, 1501, 1517). While Roxana Riddle described the girl in the back of the truck as holding onto a tire (T. 1487) Brenda Scott and Robin Bermeister indicated that she was trying to get out of the truck (T. 1051, 1517). Neither Miss Riddle nor Miss Scott was able to say who was driving the truck at that time (T. 1497, 1517).

Dr. Paul Obert, a pathologist (T. 1525), had performed the autopsy. He testified that the victim's body had bruises, abrasions and scratches over the larynx and on an area approximately two inches to the left and right of the "Adam's apple" area (T. 1529). He found evidence of bleeding in the inner ear and an increased amount of fluid in the lungs which he said was evidence that death was due to drowning (T. 1529-3). He reported that he had found no evidence that the victim had ever had sexual relations (T. 1536), that there were no bruises or abrasions anywhere around the genital area (T. 1538) and that her bathing suit was intact at the time of the autopsy (id.).

Mrs. Patricia McMahan, the wife of a local deputy sheriff (T. 1547) who was also a witness for the prosecution (T. 1626), testified that at sometime after 5:00 p.m. (T. 1547) on the day of the crime she saw a blue pick up truck, traveling at a high rate of speed, with a child in the back "holding on and hollering" (T. 1549). She stated that the pick up truck was almost hit by a "big truck" before it went out of her sight (T. 1548).

The victim's father testified that she was in his "custody and control" on the date of the crime (T. 1562); that she had been given permission to go to a 4H Club field day after which she was to have been picked up by her grandmother (T. 1564). He further testified that he had not given petitioner permission to take the victim from the park (T. 1564).

The victim's grandmother testified that she had arranged to pick the victim up at the swimming pool at 7:15 on the evening of the crime; that the victim was not there at the appointed time and that her clothing had been found in the dressing room (T. 1565-70).

Mr. George Villa testified that at 5:30 on the afternoon of the crime he saw an old model blue and beige truck, "doing about 50" (T. 1578) run a stop sign and nearly run into a "big truck" (T. 1577). He said that there had been a girl in the back of the cab (T. 1577) whom he subsequently recognized as the victim after seeing her picture in the paper (T. 1579); that she yelled something which he later "figured out" was "help me please", and that he was unable to follow the truck because his path was blocked.

Donna Drehr, age 14 (T. 1584) testified that she had known the victim (id) and had on two occasions on the day of the crime seen her in the vicinity of the pool talking with petitioner (T. 1484-5).

Mrs. Clinton Wright, the wife of the local chief of police and an employee at the swimming pool (T. 1591), had known the victim (T. 1592) and testified that shortly after 6:15 (T. 1596) on the afternoon in question the victim had asked her permission to leave the pool and go to the picnic area where she had friends (T. 1592) and that she thought that the victim had commented that she liked the mother and children but remarked that the father drank. Mrs. Wright saw the victim stop on her way back to the pool (T. 1593) to talk to someone in a pick up truck (T. 1594). Mrs. Wright was then distracted by her work (T. 1595). She also testified that she had gone with police and prosecution officials that night to petitioner's residence where she "recognized" the truck as the one at which Wendy Adams had stopped (T. 1598).

Mrs. Mary Buckner testified that she had seen a girl whom she knew "by sight" and later learned was the victim (T. 1613) near the swimming pool between 5:00 and 5:45 on the afternoon of the crime. She saw a blue truck with a "reddish" fender (T. 1607), the driver of which she was unable to identify (T. 1611), drive by once (T. 1607), return and stop near the girl (T. 1613). She then saw the girl walk toward the pool at which time the driver again drove up beside her and talked to her. The witness looked away, and when she turned back the truck was driving off with the girl in the back (T. 1614).

Messrs. Bobby McMahan, Raymond Tate and Edward Clark had each been involved in the search for Wendy Adams (T. 1626, 1643, 1650). They testified that the body was found downstream from Hell's Gate Bridge (T. 1639, 1644) after receipt of radio messages directing that that area be searched (T. 1629).

Although petitioner's witnesses did testify that the victim had been a playmate of petitioner's cousin (T. 1729) and

that he had taken them places in the family car (T. 1729); that the Jurek's pick up truck was dark blue with a cream top and no red fender (T. 1741) the back of which had "very little floor left" and contained no tire (T. 1745); that the clothing petitioner had worn on the day of the crime (white shoes, maroon or brown pants and a khaki shirt (T. 1746, 1759) was not dirty or muddy after the time of the crime (T. 1746)[8], and that petitioner had no scratches or bruises when he was taken into custody (T. 1760, 1784), the bulk of the testimony in petitioner's behalf involved the admissibility of the two statements upon which the state relief.[9]

Both defense and prosecution witnesses testified that petitioner was warned on several occasions prior to the taking of his statements that he had the right to remain silent; that he had a right to retain counsel and to have counsel appointed for him if he were ingident; that he had the right to have an attorney present during any interview with police or prosecution officials; that he had the right to terminate any interview at any time; and that any statement he made would be used against him, and the trial judge so found (Documentary Record, p. 21).

8/ See also testimony of Bobby McMahan, T. 1635-1636.

9/ In advance of trial, police and prosecution personnel were heard pursuant to petitioner's motion to determine the admissibility of the confessions (T. 12-157). The trial judge found the statements admissible (Documentary Record, pp. 21-22) and the question of their voluntariness was submitted to the jury (Documentary Record, pp. 63-64). Due to the temporary unavailability of petitioner's medical witnesses, the statements were admitted before presentation to the jury of evidence tending to show their inadmissibility (T. 1447).

Petitioner was first interviewed when police officers picked him up at his home without a warrant at approximately 1:00 on the morning of August 17, 1973 (T. 111 , 1757). Petitioner's father testified that he was at that time talked to "in a car" (T. 1748). Officer Glen Boldt testified that petitioner was "logged into jail" at 2:30 a.m. (T. 1757); that he had talked to him for about 10 minutes and that an Officer Adams had talked to him for about thirty five minutes. Petitioner was first given Miranda warnings when he was placed in jail (T. 1338, 1763). He was also questioned prior to 2:30 a.m. by the local Chief of Police (T. 1668). After this period of police interrogation, petitioner was placed "in a cell by himself" (T. 1766).

Petitioner was interviewed again at approximately 7:00 that morning after which he was interviewed by prosecution officials at approximately 9:00 a.m. (T. 111-113, 1299). At approximately 12:40 p.m. he was taken to Austin, Texas (T. 1315) where he was questioned by personnel of the Department of Public Safety (T. 1761) who were to administer a polygraph test (T. 113). During this period of questioning information was obtained that led to the discovery of the victim's body (T. 1771-72). Petitioner was returned to Cuero between 9:30 and 10:00 p.m. Only then was he taken before a magistrate (T. 1316).[10] After being advised "that he was accused of the crime of murder with malice" (Exhibits, p. 3)[11] and being given Miranda warnings (id.).

10/ The Magistrate's Certificate sets the time of this preliminary proceeding at 10:15 p.m. (Exhibits, p. 3).

11/ Petitioner was apparently not told prior to the taking of either statement that he was to be charged with a capital offense (T. 58, T. 1381).

petitioner was further interviewed by police and prosecution officials (T. 1318) after which the first statement was taken at 1:15 on the morning of August 18 (Exhibits, p. 1). Petitioner was then taken, at his own request, to the Victoria County Jail (T. 1324). He was returned to the office of the presecuting attorneys at approximately 2:00 p.m. on the afternoon of August 18 for further questioning. The second statement was signed at approximately 7:00 that evening (T. 53, 1412). Counsel was appointed on September 21, 1973 (Documentary Record, p. 12) although petitioner had not requested such appointment (T. 1388).

Witnesses to the statements testified that at the time of their signing petitioner was "nervous", "fidgety . . . and anxious" (T. 1398) and that he "only spoke in monosyllables" (T. 144).

Dr. W.C. McKinney, a phychiatrist who had examined petitioner at the request of the State, expressed a belief that petitioner did have "adequate intellectual capacity to read and understand" the two statements (T. 1678), but thought it possible that his poor insight and judgment and limited functional level of intelligence would "cause . . . [petitioner] to be able to be swayed and persuaded into . . . signing a confession against his interests" (T. 1700).

Dr. Kenneth L. Owens, a clinical phychologist, testified that petitioner had a verbal I.Q. of 66, which falls in the mildly retarded range (T. 1710). His Performance I.Q. was 99, which falls in the Average range, and his overall I.Q. was 80 (Exhibits, p. 12).[12] He thought that petitioner might have trouble

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12/ "The diagnostic classification of mental retardation relates to I.Q. as follows:

> . . . Borderline mental retardation - I.Q. 68-85".

COMMITTEE ON NOMENCLATURE AND STATISTICS OF THE AMERICAN PHYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 14 (2nd Ed. 1968).

reading the statements but would understand them if they were read to him (T. 1717) and that under stress petitioner would tend to "go where less pressure is" rather than exercise judgment (T. 1713).

Petitioner had left school in the seventh grade (T. 1726, Exhibits, p. 7) after having failed several grades (T. 1725, Exhibits, p. 7).

Petitioner's father testified that he did not know why petitioner had been picked up in the morning of August 17 and that he next saw him about three weeks later (T. 1751). His mother confirmed that it had been two or three weeks before the father was able to see petitioner (T. 1737) and testified that, despite several prior efforts, she had not been able to see petitioner until January of 1974 (T. 1733).[13/]

The record reflects only one factor which may have tended to connect petitioner with the crime and which was known to police officials at the time of the warrantless arrest; that is the identification by Mrs. Wright of the Jurek truck (see p. 13, supra). After taking petitioner to police headquarters, local police officers "confirmed" that there was a warrant outstanding for his arrest from another jurisdiction (T. 1767). There is nothing in the record as to whether that warrant was issued upon probable cause.

The jury was instructed that it could find petitioner guilty of capital murder, guilty of non-capital murder with malice, guilty of non-capital murder without malice or not guilty (Documentary Record, pp. 61-63). The jury found petitioner

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13/ Witnesses to the statements testified that at the time of their signing there was no person present who might have spoken for or represented the interests of petitioner (T. 1396, 1419).

"GUILTY OF CAPITAL MURDER WHILE IN THE COURSE OF COMMITTING OR ATTEMPTING TO COMMIT KIDNAPPING AND/OR FORCIBLE RAPE. . . ."

(Documentary Record, p. 67, T. 1867).

A penalty trial was held the following day at which the prosecution presented four witnesses, Mr. Bobby McMahan, a local deputy sheriff; Mr. Lasaro Compos; Mr. Crockett Squyres, a service station employee; and Mr. Glenn Boldt, a local police officer. Each was asked if he knew "the general reputation" that petitioner bore in the community "for being a peaceable and law-biding citizen" (T. 1872-73, 1876, 1879, 1887). Each responded that petitioner's reputation was "bad" (T. 1873, 1876, 1879, 1888). Mr. McMahan stated that his opinion was based solely upon arrests of petitioner and that he knew of no case in which petitioner had been convicted of a crime (T. 1874). Mr. Compos stated that his testimony was based upon "hearsay" (T. 1877). Mr. Squyres stated that his testimony was based upon hearsay (T. 1885) and petitioner's truancy during his school years (T. 1880). Mr. Boldt testified that his opinion was based upon the crime at issue and upon hearsay (T. 1891).

Petitioner's father presented testimony regarding his work history, his church attendance and his family life, after which the prosecuting attorney asked the witness if he had heard that his son had been charged in 1969 with assault with intent to rape a ten year old child; charged in the State of Louisiana with the attempted rape of a seven ye.r old girl and charged with the crime of forgery (T. 1987-1899). The witness tesfified that he had not heard of the first two charges and that the third offense had been committed by petitioner's wife (T. 1898-99).

The jury, having been made aware of the consequences of its responses (See, e.g., T. 260, 935, 1907),[14] deliberated for one hour (T. 1910) after which it returned affirmative responses to the questions whether "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result" and whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (Documentary Record, p. 69, T. 1911), whereupon, a sentence of death was pronounced by the trial judge (Documentary Record, p. 72).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

On September 21, 1973, the State filed written notice of its intent to seek a death penalty (Documentary Record, p. 10). On January 10, 1974, petitioner moved to dismiss the indictment on the ground that the death penalty was unconstitutional (Documentary Record, p. 27); the motion was denied without opinion in open court on January 25, 1974 (T. 174-175). Petitioner filed an amended motion for a new trial on February 25, 1974 (Documentary Record, p. 78) which included, among other grounds, the unconstitutionality of the death penalty; the motion was denied in open court (T. 1928-29).

On appeal to the Texas Court of Criminal Appeals, petitioner raised and briefed the issue of the constitutionality of the death penalty. The judgment and sentence were affirmed by opinion dated April 16, 1975, two judges dissenting on the ground

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14/ Twelve members of the voir dire panel had been excused for cause after indicating their opposition to capital punishment (T. 377-9, 448-9, 604-7, 680, 700, 805, 809, 875, 988, 992, 1040-41, 1104-06).

that Article 37.071(b)(2), requiring that the jury determine whether there was "a probability" that the defendant would commit future acts of violence was unconstitutionally vague (Jurek v. State, supra, opinions of Judge Odom and Judge Roberts).

Petitioner filed a motion to determine the admissibility of the two statements on October 23, 1973 (Documentary Record, p. 18). A hearing was held on October 25, 1973 (T. 12-163) after which the court issued written findings of their admissibility (Documentary Record, pp. 21-22). The jury was instructed that it could not consider the statements unless it first found, beyond a reasonable doubt, (1) that they had been made in writing to some person who had advised petitioner of his rights to have an attorney present prior to or during any questioning; to have a lawyer appointed to counsel with him; and to remain silent and had warned him that any statement he made could be used against him, and (2) that the defendant had knowingly, intelligently and voluntarily waived those rights (Documentary Record, pp. 63-64). Petitioner's amended motion for a new trial, which was denied in its entirety on February 25, 1975, included allegations as to the admissibility under federal constitutional standards of the statements. The issue was raised and briefed on appeal to the Texas Court of Criminal Appeals, which upheld the findings of the trial judge and the implicit finding of the jury that the statements were admissible.

Petitioner raised both issues in a motion for rehearing which was denied on May 7, 1975.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

A. The Perpetuation of Arbitrary Selectivity Under The New Texas Capital Punishment Statutes

On June 29, 1972, this Court invalidated the capital punishment laws of the State of Texas and held that the death penalty could no longer be imposed under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Branch v. Texas, 408 U.S. 238 (1972). In the wake of Branch v. Texas,[15] the Texas legislature modified its death penalty statutes, and petitioner and at least twenty other defendants[16] have been condemned under these newly enacted procedures. The question presented here is whether the modifications wrought by the Texas legislature are substantial enough to meet the

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15/ This case will hereafter be referred to by the name of the lead companion case, Furman v. Georgia.

16/ State v. Smith, Dallas County Criminal Ct. No. C73-12659 (March 27, 1974); State v. Freeman, Atascosa County District Ct. No. 5816, (April 22, 1974); State v. Robinson, Dallas County Criminal Ct., No. C-74-3195 PQ (July 29, 1974); State v. Bird, Cameron County District Co., No. 50213 (September 5, 1974); State v. Bell, Jefferson District Co., No. 31679 (December 27, 1974); State v. Cuevas, Harris County District Co., No. 219833; State v. Castro, Bexar County District Co., No. 74CR2869A; State v. Burns, Ector County District Ct., No. B 7459 (February 22, 1974); State v. White, Lubbock County District Ct., No. 15715 (January 12, 1975); State v. Moore, Dallas County Criminal Ct., No. CT 43180PH (June 20, 1974); State v. Boulware, Dallas County Criminal Ct., No. C74-1299 QK (May 4, 1974); State v. Hughes, Dallas County Criminal Ct., No. C74-10214HL (January 20, 1975); State v. Skillern, Live Oak County District Ct., No. 1996 (March 1, 1975); State v. Collins, McLenna County District Ct., No. 75-9-C (February 7, 1975); State v. Gholson, Bell County District Ct., No. 22412 (February 3, 1975); State v. Ross, Bell County District Ct., No. 22411 (February 3, 1975); State v. Brock, Harris County District Ct., No. 21320 (February 4, 1975); State v. O'Bryan, Harris County District Ct., No. 220323 (June 4, 1975); State v. Kleason, Travis County District Ct., No. 4846Z (June 10, 1975); State v. Woodkins, Harrison County District Ct., No. 1581 (April 1, 1975).

minimum requirement of Furman v. Georgia -- that the most extreme penalty known to contemporary man not be imposed arbitrarily.[17]

Once this Court has determined the existence of unconstitutional practices, it has heretofore invalidated subsequent contrivances and evasions which seek to perpetuate such practices in new guises. Cf. Guinn v. United States, 238 U.S. 347 (1915) with Lane v. Wilson, 307 U.S. 268 (1939). The Constitution "nullifies sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, supra, at 275. As will be demonstrated infra, death sentences are still "wantonly and . . . freakishly imposed," Furman v. Georgia, supra, at 310 (Mr. Justice Stewart, concurring) in Texas, and the statutory modifications of 1973 provide "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." Id. at 313 (Mr. Justice White, concurring).

The Texas statutes under which petitioner was convicted provide a possible death penalty for murder[18] if the crime was committed "with malice aforethought" and any of five circumstances is found to exist:

17/ The submissions in subsection I-B, p. 49, infra, draw upon broader aspects of the Furman holding than the minimum requirement stated in the text here. As this subsection I-A, pp. 25 - 49 infra, demonstrates, however, the present case presents a capital procedure which so clearly violates the minimum requirement that the Court need not necessarily consider here those broader aspects.

18/ Murder was defined as follows:

> Whoever shall voluntarily kill any person within this state shall be guilty of murder. Murder shall be distinguished from every other species of homicide by the absence of circumstances which reduce the offense to negligent homicide or which excuse or justify the killing.

Texas Penal Code, Art. 1256 (Appendix, Vol. IV, Vernon's Texas Penal Code (1974)).

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

Texas Penal Code, Art. 1257, subsection (b). (Appendix, Vol. IV, Verson's Texas Penal Code (1974)).

When a defendant is found guilty of murder committed with malice aforethought under one of the five enumerated circumstances a separate sentencing hearing is conducted before the trial jury at which "evidence may be presented as to any matter that the court deems relevant to sentence," and "[t]he state and the defendant or his counsel shall be permitted to present argument for or against sentence of death." Vernon's Texas Code of Crim. Procedure Ann. Art. 37,071, subsection (a) (1974 Supp.). The jury is then asked to determine the following issues beyond a reasonable doubt:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Vernon's Texas Code of Crim. Procedure Ann. Art. 37.071, subsections (b) and (c) (1973). "[I]t may not answer any issue 'yes' unless it agrees unanimously,' and 'it may not answer any issue 'no' unless ten or more jurors agree." Vernon's Texas Code of Crim. Procedure Ann. Art. 37.071, subsection (d) (1974 Supp.). Subsection (e) of Article 37.071 provides:

> If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

Subsection (f) provides for prompt, mandatory review by the Court of Criminal Appeals of judgments of conviction and sentence of death.

When a jury fails to find beyond a reasonable doubt that one of the enumerated circumstances was present it may convict the defendant "of murder, with or without malice" [19] or "of any other lesser included offense" Texas Penal Code, Art. 1257, subsection (c) (Appendix, Vol. IV, Vernon's Texas Penal Code Ann. (1974)).

Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated.

The discrepancy between the regularity and even-handedness constitutionally required in capital sentencing and the unpredictable arbitrariness which results from the modified Texas

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19/ In such a case the punishment may be set at life imprisonment or "any term of years not less than two." Texas Penal Code, Art. 1257, subsection (a) (Appendix, Vol. IV, Vernon's Texas Penal Code Ann. (1974)).

procedures can only be appreciated after analysis of the various selective mechanisms which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. For the imposition of a death sentence in Texas remains an extraordinarily rare and fortuitous event not only because juries so often seize the opportunity for mercy offered at the sentencing stage, but also because a death sentence signifies that a defendant has missed each of the many other opportunities for a lesser disposition.

1. Pre-Sentence Selective Mechanisms

Artitrary selection operates well before sentencing to spare a substantial portion of potential capital defendants, although others similarly situated are ultimately sentenced to death. The importance of these pre-sentence selective mechanisms is that they provide an opportunity for all but a relative handful of defendants who may have committed capital crimes to be artibrarily spared capital conviction.

i. Prosecutorial Discretion

The impact of the district attorney's discretion on the administration of criminal justice in Texas is enormous and is unaffected by the new capital punishment statute: [20] "Whom

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20/ In addition to the broad discretion traditionally given the public prosecutor which is the subject of this subsection, Texas prosecutors were formerly permitted to elect, in writing, fifteen days before trial of a capital charge, to seek or decline to seek a death penalty. This provision was contained in Article 1.14 of the Code of Criminal Procedure:

> The defendant in a criminal prosecution for any offense may waive any rights secured him by law except the right of trial by jury in a capital felony case in which the State has made known in open court in writing at least 15 days prior to trial that it will seek the death penalty. No case in which the State seeks the death penalty shall be tried until 15 days after such notice is

he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion."[21] In Texas, the decision to prosecute and the choice of charges for which indictment will be sought are left to the district attorney's absolute, unguided discretion.

On the facts shown in petitioner's case, for example, a prosecutor might have concluded, quite responsibly, that indictment should have been sought for noncapital homicide. For there was no evidence of actual forcible rape, and the only evidence

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20/[Continued]

> given. When the State makes known in writing in open court that it will not seek the death penalty in a capital case, the defendant may enter a plea of guilty before the court and waive trial by jury as provided in Article 1.13 and in such case under no circumstances may the death penalty be imposed.

Article 1.14 was amended at the time of the enactment of the new Texas death penalty statutes to read as follows:

> The defendant in a criminal prosecution for any offense may waive any rights secured him by law except the right of trial by jury in a capital felony case.

Acts 1973, 63rd Leg., Ch. 426, eff. June 14, 1973.

A notice of intent to seek the death penalty was, however, filed in this case (Documentary Record, p. 10, dated September 21, 1973). See also, discussion of State v Dowden, Harris County District Co., No. 225,031, at p. 31, infra.

21/ Note, Prosecutorial Discretion, 21 DE PAUL REV. 485 486 (1971-1972).

of attempted forcible rape[22] was testimony that prior to the crime petitioner had expressed an intention to have sexual relations and his statement that before he began choking the victim he "asked her if she wanted to have sex with me, but she said no and started screaming. . . ." The only evidence of attempted

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22/ There is no crime in Texas which is termed "forcible rape." The following relevant statutes were in effect on the date of the crime involved here:

Texas Penal Code, Art. 1183. Rape.

> Rape is the carnal knowledge of a woman without her consent obtained by force, threats or fraud; or the carnal knowledge of a woman other than the wife of the person having such carnal knowledge with or without consent and with or without the use of force, threats or fraud, such woman being so mentally diseased at the time as to have no will to oppose the act of carnal knowledge, the person having carnal knowledge of her knowing her to be so mentally diseased; or the carnal knowledge of a female under the age of eighteen years other than the wife of the person with or without her consent and with or without the use of force, threats or fraud; provided that if she is fifteen years of age or over the defendant may show in consent cases she was not of previous chaste character as a defense.

Texas Penal Code, Art. 1184. Force.

> The definition of force as applicable to assault and battery applies also to rape, and it must have been such as might reasonably be supposed sufficient to overcome resistance, taking into consideration the relative strength of the parties and other circumstances of the case.

Texas Penal Code, Art. 1190. Attempt to rape.

> If it appear on the trial of an indictment for rape that the offense though not committed was attempted by the use of force, threats or fraud, but not such as to bring it within the definition of assault with intent to commit rape, the jury may find the defendant guilty of an attempt to rape and assess his punishment at confinement in the penitentiary for any term of years not less than two.

Texas Penal Code, Art. 1162. Assault with intent to rape.

> If any person shall assault a woman with the intent to commit the offense of rape he shall be confined in the penitantiray for any term of years not less than two.

Appendix, Vol. IV, Vernon's Texas Penal Code Ann. (1974).

or actual kidnapping was testimony that petitioner took the victim for a ride in his truck without the consent of her legal guardian.[23]

Yet the prosecutorial decision to seek indictment for "murder in the course of committing or attempting to comit kidnapping or forcible rape" could, quite literally, cost petitioner his life.

The Texas presecutor also has broad discretion to enter a judgment of nolle prosequi. He must obtain consent of the

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23/ The kidnapping provision relied upon by the prosecution is so broad that it is difficult to imagine a killing of a person under the age of seventeen that could not be raised to a capital offense by incovation of its provisions. Indeed, the prosecutor routinely asked potential jurors whether they had any disagreement with the law that would make it difficult or impossible for them to enforce it (See, e.g., T. 281, 296-199, 330).

Counsel for petitioner have found only one reported case arising under this provision, Young v. State, 419 S.W.2d 864 (1967).

The statute reads, in relevant part, as follows:

> when any person is falsely imprisoned . . . if a minor under the age of seventeen years, for the purpose of being concealed or taken from the lawful possession of a partne or guardian, such false imprisonment is 'kidnapping.' If the person kidnapped to [sic] be under fifteen years of age, it is not necessary that there should be want of consent nor that there should be force in order to constitute kidnapping. . . .

Texas Penal Code, Art. 1177 (Appendix, Vol. IV, Vernon's Texas Penal Code Ann. 1974).

trial court and state his reasons for dismissing the charges,[24] but "the statute does not prescribe any particular reasons to be assigned; therefore [the prosecuting attorney] may assign any reason which the court may deem sufficient upon which to base his action in dismissing the case." Ex parte Rusk, 128 Cr.R. 865, 79 S.W.2d 865, 866 (1935). This clear authority to dismiss an entire indictment has been held to encompass the implied authority to dismiss that portion of an indictment which charges a greater degree of criminal homicide and try the defendant for a lesser offense.

> An indictment for murder in the first degree including as it does, all the lesser degrees of culpable homicide, and the district and county attorney being authorized by law to dismiss the entire prosecution, if consented to by the trial judge, it follows that he has the authority to abandon the prosecution as to any degree of offense embraced within an indictment, if such action is sanctioned and approved by the trial judge. The granting of the greater power necessarily included the lesser power, and is clearly within the plain intent and meaning of the law as enacted by the Legislature.

Gentry v. State, 68 Cr.R. 567, 152 S.W. 635, 636-637 (1913).

See, also, Wiley v. State, 92 Cr.R. 395, 244 S.W. 538 (1922); Clay v. State, 70 Cr.R. 451, 157 S.W. 164 (1913).

24/ Article 32.02 of the Texas Code of Criminal Procedure provides:

> . . . the attorney representing the State may, by permission of the Court, dismiss a criminal action at any time upon filing a written statement with the papers in the case setting out his reasons for such dismissal, which shall be incorporated in the judgment of dismissal. No case shall be dismissed without the consent of the presiding judge."

Vernon's Texas Code of Crim. Procedure Ann. (1966).

The requirement that the reasons for the dismissal be set forth in writing has been held to be "directory and not mandatory" and an oral request for dismissal followed by a dismissal order in which reasons for dismissal were incorporated has been upheld as being in substantial compliance. Ex parte Rusk, 79 S.W.2d 865, 866 (1935).

Furthermore, the district attorney's discretion to plea bargain -- a process by which an estimated ninety per cent of all cirminal cases are resolved[25] -- is utterly unfettered by the new capital punishment statute, or by any other significant restriction.[26] The fact that capital cases are likely to take up a great deal of time in preparation and trial makes them particularly likely to be settled by plea bargaining.[27] The peculiar harshness of a death sentence creates a relatively great risk that a conviction will be reversed on appeal for procedural error[28] and increases the pressure to settle a capital case by a negotiated guilty plea:

25/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

26/ Section 26.13 of the Code of Criminal Procedure provides:

> If the defendant pleads guilty, or enters a plea of nolo contendere, he shall be admonished by the court of the consequences; and neither of such pleas shall be reviewed unless it plainly appears that he is mentally competent, and is uninfluenced by any consideration of fear, or by any persuasion, or delusive hope of pardon, prompting him to confess his guilt.

Vernon's Texas Code of Crim. Procedure (1974 Supp.)

A plea bargain entered in the hope of avoiding a death penalty is not invalid. Jenkins v. Beto, 442 F.2d 655 (C.A. 5, 1971), Ex parte Black, 457 S.W.2d 919, 921 (Tex. Cr. App. 1970), federal habeas corpus granted in other grounds, 327 F.Supp. 1405 (W.D. Tex. 1971).

27/ Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. CHI. L. REV. 50, 55 (1966).

28/ See, Salazar v. State, 131 S.W.2d 761 (Tex. Cr.App. 1939) ("this bill [of exception] is multifarious and in an ordinary case would not be considered, but in a severe penalty as this one [death] we will proceed to consider the same," at 763).

> Since time immemorial [prosecutors] will prefer to get a definite conviction, without the tremendous expense that goes with a . . . [capital] trial, the taking of a chance that a jury may not convict, or that some technical error will be made in the heat of trial which will result in a reversal by an appellate court. 29/

It is therefore inevitable that prosecutors will seize the opportunity provided at the plea bargaining stage to exercise unregulated authority to spare large numbers of capital defendants. See, e.g., State v. Dowden, Harris County District Ct. No. 225,031, Transcript of Pleadings, dated April 30, 1975, in which the defendant, having been indicted for capital murder, changed his plea from not guilty to guilty (at p. 18); the State withdrew its "Motion to Seek the Death Penalty" (at pp. 4-5) and recommended a sentence of life imprisonment (at p. 15); and the defendant was sentenced in accordance with the State's recommendation (at p. 33).

ii. Jury Discretion

Although the jury controls the sentencing determination in a Texas capital case, see pp. 38 - 45, infra, that is not the first or only means available to it to spare the defendant's life in cases where, if otherwise disposed, it might choose to sentence him to die.

Juries have traditionally avoided the death penalty by convicting defendants of lesser, rather than capital offenses. Indeed, American juries called upon to determine cases in which the death penalty was mandatory upon conviction have frequently refused, despite strong evidence of guilt, to return a guilty verdict with regard to the capital offense. See McGuatha v.

29/ Bedau, Death Sentences in New Jersey, 19 RUTGERS L. REV. 1, 30 (1963).

California, 402 U.S. 183, 199 (1971) and authorities cited therein. The new death penalty provisions of the Texas Penal Code do nothing to regularize pre-existing jury discretion to convict a capital defendant of a lesser offense. Moreover they offer the jury the additional opportunity to avoid the death penalty by finding the defendant guilty of murder but failing to find that the offense was capital.

Any of five circumstances will, if found by the jury to have existed beyond a reasonable doubt, serve to remove a crime from the category of murder (carrying a maximum penalty of life imprisonment) to the category of capital murder (punishable by life imprisonment or death). But "[i]f the jury does not find beyond a reasonable doubt that the murder was committed under one of . . . [these] circumstances . . . the defendant may be convicted of murder, with or without malice . . . or of any other lesser included offense." Texas Penal Code, Article 1257(c) Appendix, Vol. IV, Vernon's Texas Penal Code Ann. (1974).

We have examined, at pp. 26 - 28, supra, the nature of the evidence offered to support the charge that the murder of which petitioner was convicted was committed "in the course of committing or attempting to commit kidnapping . . . [or] forcible rape. . . ." In accordance with the provisions of subsection (d) of Article 1257, "prospective jurors . . . [were] informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged [in the indictment]." (See, e.g., T. 196-197.) In his closing remarks to the jury, the prosecutor made it clear on several occasions that he was urging a finding of guilt under one or both of the charged special circumstances in order that a

death penalty might be imposed.[30]

In this, the context of an actual case, it becomes clear that the special circumstance determination is for the jury (as it was for the prosecutor) a selective mechanism through which it will inevitably "[respond] to sentiment, under the guise of resolving issues of evidential doubt."[31]

In addition to creating this new opportunity for the jury to avoid the death penalty by the terms of its verdict, the Texas legislature has explicitly preserved the right of the jury to convict the capitally charged defendant of any of several lesser offenses.

Petitioner's jury was instructed, pursuant to Articles 1257(a) and 1257(b) of the former Penal Code,[32] and subsection (c)

30/ . . . I guarantee you if I was on that jury it wouldn't take me five minutes to find that man guilty of capital murder, the last -- the fourth option on that -- on the charge. And it wouldn't take me but another five minutes after that when we had the punishment to find all the answers 'Yes', so that they could give this man what he had coming real, real, quick. (T. 1864) See, also, T. 1845, 1855, 1857-1860, 1864.

31/ KALVEN and ZEISEL, THE AMERICAN JURY 427 (1967).

32/ Section 1257(a) provided:

> In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed 5 years, the defendant shall have the benefit of the suspended sentence act.

of Article 1257, that it could find him guilty of noncapital murder with malice or of murder without malice. The distinction between the latter two crimes was defined in the court's charge as follows:

> Malice aforethought is the voluntary and intentional doing of an unlawful act by one of sound mind and discretion, and with the purpose, means and ability to accomplish the reasonable and probable consequences of the act, and includes all those states of mind under which the killing of a person takes place without any cause which will in law justify, excuse or extenuate the homicide. It is that condition of mind which shows a heart regardless of social duty and fatally bent on mischief.
>
> Murder without malice is a voluntary homicide, committed without legal justification or excuse, under the immediate influence of a sudden passion arising from an adequate cause, by which is meant such cause as would commonly produce a degree of anger, rage, resentment or terror in a person of ordinary temper sufficient to render the mind incapable of cool reflection.

Documentary Record, pp. 59-60.

The right of the Texas jury to consider lesser included offenses is broadly interpreted. A lesser included offense must be charged, upon defendant's request, whenever it is raised by the evidence, Lucky v. State, 495 S.W.2d 919 (Tex. Cr. App. 1973) (involving the trial court's duty to charge a lesser degree of murder), Hargrove v. State, 501 S.W.2d 878 (Tex. Cr. App. 1973) (involving the trial court's duty to charge aggravated assault).

Indeed, in Blocker v. State, 27 Cr. R. 16, 10 S.W.

32/[Continued]

Section 1257(b) provided:

> In all cases tried under the provisions of this Act, it shall be the duty of the court to define "malice aforethought" and it shall apply that term by appropriate charge to the facts in the case and shall instruct the jury that unless from all the facts and circumstances in evidence the jury believes the defendant was prompted and acted with his malice aforethought they cannot assess the punishment at a period longer than 5 years; provided, however, that no offense committed prior to the taking effect of Chap. 274, etc. shall be affected thereby.

(Appendix, Vol. IV, Vernon's Texas Penal Code Ann. 1974).

439 (1889), the court took "occasion . . . to suggest to trial judges that they should be exceedingly cautious in murder trials in declining to charge upon murder in the second degree. Instances are comparatively rare in which such a charge may be properly dispensed with" (10 S.W. at 440). And, under the later statutory scheme in which degrees of murder were dispensed with, the Court of Criminal Appeals has said that murder without malice should be submitted "even in a doubtful case," if raised by the evidence, Armentrout v. State, 515 S.W.2d 297, 199 (Tex. Cr. App. 1974), "whether it be strong, weak, unimpeached, or contradicted," Thompson v. State, 521 S.W.2d 621, 624 (Tex. Cr. App. 1975). When intent is at issue, submission of aggravated aassult is similarly required. Thompson v. State, supra; Matheson v. State, 508 S.W.2d 77 (Tex. Cr. App. 1974); Trotter v. State, 341 S.W.2d 923 (Tex. Cr. App. 1960).

Moreover, a conviction for a lesser offense will be sustained even though it is contrary to law and evidence, for "[a] verdict is not contrary to the law and evidence . . . where the defendant is found guilty of an offense of an inferior grade to, but of the same nature as the offense provided." Vernon's Texas Code of Crim. Procedure Ann, Art. 40.03(9).[33/] As the court said in Gatlin v. State, 86 Cr.R. 399, 217 S.W. 689 (1919)(in

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33/ The reasons for this rule were set forth in Burnett v. State, 53 C.R. 515, 112 S.W. 74, 78 (1908):

> [a]t best the grades and degrees of an unlawful killing are more or less arbitrary and the line between them sometimes difficult to be drawn.

which the appellant had been charged with homicide and convicted of assault with intent to murder). "The decision as to the degree of offense one shall be found guilty of, if at all, is for the jury, and, if they err in giving a verdict in favor of a lesser degree, we know of no authority which gives to appellant any right or ground of complaint." 217 S.W., at 702.

A jury may also convict of criminal attempt even through the crime was consummated. Ward v. State, 151 S.W. 1073, 68 Cr.R. 154 (1912).

The jury is thus given considerable unreviewable discretion -- contingent, of course, upon the exercise of discretion by the trial court in the choice of crimes on which it will be instructed -- to convict a capital defendant of a lesser offense, not only in cases where the distinctions between crimes or degrees of offenses are blurred, but also in cases where conviction of the lesser offense would be wholly inconsistent with the facts proved.

A jury may also be instructed to acquit or mitigate punishment on the basis of necessarily speculative and imprecise determinations regarding the state of the defendant's mind at the time of the crime. A defendant is entitled to a verdict of acquittal if

> [a]t the time of committing the act the party accused was laboring under such defect of reason, from disease of mind, as not to know the nature and quality and consequence of the act he was doing; or if he did know, that he did not know he was doing wrong, that is, that he did not know the difference between the right and the wrong as to the particular act charged against him. . . .

Freeman v. State, 317 S.W.2d 726, 730 (Tex. Cr. App. 1958).

Acquittal is also required if the defendant "was laboring under a mistake as to a particular fact . . . such that . . . [his conduct] would have been excusable had his conjecture as to the fact been correct. . . ." Texas Penal Code, Art. 41 (Appendix, Vol. IV., Verson's Texas Penal Code Ann. (1974); or if he was forced "by threats [of loss of life or personal injury] or actual violence to commit the crime, Texas Penal Code, Article 38 (Appendix, Vol. IV., Verson's Texas Penal Code Ann. (1974). Evidence of temporary insanity "produced . . . by . . . use of ardent spirits, intoxicating liquor, narcotics, or dangerous drugs, or a combination thereof, may be introduced by the defendant in mitigation of . . . penalty." Texas Penal Code, Art. 36 (Appendix, Vol. IV., Vernon's Texas Penal Code Ann. (1974)[34/]

The fluid nature of these concepts upon which the jury verdict turns, many of which are "notoriously refractory to the best-instructed human understanding,"[35/] afford what Justice Cardozo described in analyzing the distinction between degrees of murder as an indirect "dispensing power" of mercy, vouchsafed in "a mystifying cloud of words."[36/]

34/ Similar current provisions are contained in Vernon's Texas Penal Code Ann. Sections 8.01 (involving insanity); 8.02 (involving mistake); 8.05 (involving duress) and 8.04 (involving intoxication) (1974).

35/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 299 (1971).

36/ CARDOZO, LAW AND LITERATURE 99 (1931).

2. Sentencing Discretion

It was the opinion of a majority of the Court of Criminal Appeals that sentencing discretion remained under the new Texas death penalty statutes, but was sufficiently controlled to meet the Furman prohibition or arbitrary imposition of capital punishment:

> We are inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula. However, there are some factors which are readily apparent and are viable factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand. . . .
>
> Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. . . . The mere presence of discretion in the sentencing process does not render that procedure violative of Furman. It is rather the quality of discretion and the manner in which it is applied that must be controlled. To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence. If discretion in the assessment of punishment under a statute can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman will be met.
>
> After considerable reflection, we find that the statutes with which we are confronted today do meet this test.

Jurek v. State, supra, 522 S.W.2d at 939-40 (footnotes omitted). But see, Opinion of Judge Odom, Concurring in Part and Dissenting in Part, 522 S.W.2d at 943-44. Moreover, in holding in Hovila v. State, No. 49,397 (opinion dated April 30, 1975) that the standards set forth in Witherspoon v. Illinois, 391 U.S. 510 (1968), must be enforced in trials conducted under the new capital sentencing procedures, the Court of Criminal Appeals said:

> While the new statutes provide that the jury shall take an oath that they will not let the penalty involved affect their deliberations and requires them only to answer questions while the judge actually assesses punishment based on such answers, the fact remains that the jury will know that their answers will determine whether the defendant is to be punished by death or by life imprisonment. To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime simply because they will not bring forth the ultimate verdict would be to disregard the obvious. We will not engage in such tenuous reasoning.

Opinion at p. 1, but see, dissenting opinion of Judge Odom.

A description of the Texas capital sentencing procedure confirms the Texas Court's judgment as to the discretionary character of the decision-making and challenges its conclusion that the arbitrariness condemned by Furman has been precluded.

Upon return of a capital conviction, the jury hears evidence "on any matter that the Court deems relevant to sentence" and argument "for or against the sentence of death."[37] It is then asked to determine three highly subjective questions of degree, none of which involves a determination of facts sub-

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37/ Vernon's Texas Code of Criminal Procedure Ann., Article 37.071(a)(1974).

ject to precise proof, and none of which will necessarily have been addressed in the evidenciary presentation or in the arguments of counsel.[38]

The jury is first asked to determine "whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that . . . death would result." This is a distinction long recognized as lacking a discernable difference and long used as a mask behind which juries might exercise absolute life or death discretion. The concept of deliberate conduct with reasonably expected results differs little from the old concepts of deliberation, premeditation and malice aforethought which "distinguished" degrees of murder. The division of murder into obscurely defined degrees, with only the greater degree carrying a death penalty, was first proposed in Pennsylvania "[w]ith the intention of giving the trial jury an opportunity to exclude from the punishment of death all murderers whose crime was not of the gravest nature,"[39] and with the result that jurors "have no alternative to using their general sense of the equities of the matter." For "the purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless."[40]

38/ In Petitioner's case the State's evidence consisted of three one-word descriptions of petitioner's reputation for being a peaceable and law abiding citizen. See P. 18, supra.

39/ BEDAU, ed., THE DEATH PENALTY IN AMERICA (1967) ed. at 24.

40/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

The difficulty of applying Article 37.071 is compounded by the fact that the jury is required to determine the question stated in subsection (b)(1) after having determined that the defendant is guilty of murder with malice and therefore that the killing was voluntary (Texas Penal Code, Article 1256) and that the victim's death was not caused "under the immediate influence of sudden passion arising from an adequate cause," Texas Penal Code, Article 1257(c), and was not the result of negligence. Texas Penal Code, Article 1256.[41/]

Precise identification of the shades of deliberateness which distinguish "voluntary" murders resulting neither from adequately caused sudden passion or from negligence is impossible.

Subsection (b)(2) requires a Texas capital jury to determine "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." The California Supreme Court has termed this evaluation a "question . . . that no human mind can answer," People v. Morse, 36 Cal. Reptr. 201, 388 P.2d 33, 40 (1964). We may put aside the question whether prediction of human behavior can be accomplished by experts[42/] or by lay juries,[43/] for the Texas statute does not require this Court

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41/ Appendix, Vol. IV., Vernon's Texas Penal Code Ann., (1974) For similar provisions of the new penal code, see §§19.04 and 19.05.

42/ See, Ennis and Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 CALIF. L. REV. 693 (174), Steadman, Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry, 1 JOURNAL OF PSYCHIATRY AND LAW 409 (1973).

43/ All available data indicate that convicted murderers are for less likely than other convicted criminals to engage in subsequent criminal activity, see, Waldo, The "Criminality Level" of Incarcerated Murderers and Non-Murderers, 60 JOURNAL OF CRIMINAL LAW, CRIMINOLOGY, AND POLITICAL SCIENCE, 60 (1970), Neithercutt, Parole Violation Patterns and Commitment Offense, 9 JOURNAL OF RESEARCH IN CRIME AND DELIQUENCY, 87 (1972), yet

to decide whether such prediction can ever be anything but an arbitrary exercise in discretion thinly masked as a predictive judgment.

This is so for two reasons. First, the term "probability," as used in the Texas statute, is utterly meaningless. Two Judges of the Texas Court of Criminal Appeals dissented from the decision to affirm petitioner's sentence on the ground that the determination of "a probability" was impossible or meaningless. Judge Odom noted the inherent vagueness (Jurek v. State, supra, 522 S.W.2d at 944, Opinion of Judge Odom Concurring in Part and Dissenting in Part) of Article 37.071(b)(2):

> What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a "probability" that he will perform certain acts in the future? Did it mean, as the words read, is there a probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, and no one would say it is no probability or not a probability. It has been written: "It is probable that many things will happen contrary to probability," and "A thousand probabilities do not make one fact." The statute does not require a particular degree of probability but only directs that some probability need be found. The absence of a specification as to what degree of probability is required is itself a vagueness inherent in the term as used in this issue.

43/[Continued]

> "Predictions of human conduct are difficult to make, because man is a complex entity and the world he inhabits is full of unexpected occurrences that cannot be catalogued and predicted actuarially. Predictions of rare human events are even more difficult to make. . . ."

Dershowitz, Pretrial Detention, 57 AMERICAN BAR ASSOCIATION JOURNAL 560, 562 (1971). (". . . participants in the judicial process are better equipped by their experience to construct and employ theories about what probably occurred in the past than they are to employ theories about what is likely to occur in the future." Ibid.)

> Our common sense understanding of the term leaves the statute too vague to pass constitutional muster."

(Id. at p. 94, (footnotes omitted). Judge Roberts, finding himself bound by local law to adopt the "technical" meaning of the word probability, and finding that the technical meaning of "a probability" is "simply a chance -- however large or small" Jurek v. State, supra, 522 S.W.2d at 948 (Dissenting Opinion of Judge Roberts) concluded that

> [petitioner's] punishment was decided to a significant degree by the answer to a question which -- as a result of its vagueness and overbreadth -- could not have been answered in his favor.

(Id. at p. 4)(Emphasis in original).

Second, the events to be predicted are so amophously described that any pretext of fact finding is dissipated. The issue is whether the defendant will commit "criminal acts of violence that would constitute a continuing threat to society." But

> [h]itting someone with your fist is a 'criminal act of violence'; does the section mean that a jury must vote to electrocute persons shown to be given to fisticuffs? If not, where is the line? Secondly, what is the difference between 'criminal acts of violence' which do, and those which do not, constitute a continuing threat to society. 50/

The jury is finally asked to decide "if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." This question, like the first, overlaps

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44/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 63 (1974).

questions concerning the statutory distinctions among categories of homicide. For here the jury is aksed to decide an issue which is, for practical purposes, indistinguishable from the issue which it should have decided in determining whether the defendant was guilty of murder with or without malice; whether the victim's death was caused under the influence of "sudden passion arising from an adequate cause."[45/] More important, it too is an inquiry regarding the defendant's state of mind and involves a relative determination. Reasonableness is not an ascertainable fact but a point on a continuum -- a point which varies with the personality and preconceptions of the decider.

Although the state is required to "prove" these issues "beyond a reasonable doubt"[46/] it is virtually impossible to conceive of circumstances which could appropriately lead to a capital murder conviction with regard to which "yes" or "no" responses to questions (1) and (3) would not be equally justifiable. And it is difficult even to comprehend the notion of proving "beyond a reasonable doubt" that there is "a probability" that a defendant will engage in future violent acts.

45/ Interestingly, the trial judge in petitioner's case determined that the issue of murder without malice should be submitted to the jury (a decision which, in the absence of evidence showing that the defendant acted under the immediate influence of sudden passion arising from an adequate cause, is permissible, Johnson v. State, 216 S.W.2d 573 (Tex. Cr. App. 1948); Ludwig v. State, 298 S.W.2d 166 (Tex. Cr. App. 1956); Crowder v. State, 78 Tex. Cr. R. 344, 180 S.W. 706 (1915); but not mandatory. Lamberson v. State, 509 S.W.2d 328, 331 (Tex. Cr. App. 1974)), but that the question posed by subsection (b)(3) of Article 37.071 was not "raised by the evidence."

46/ See n.35, supra.

The Texas capital jury must in all cases be informed that "a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged." Texas Penal Code, Article 1257, subsection (d) (Appendix, Vol. IV, Verson's Texas Penal Code Ann. (1974)). Petitioner's jury was informed of the precise consequences of its responses to the sentencing questions. The voir dire panel was told, for example, that:

> [By the Court] . . . The -- the questions that you are called upon to answer, whether it is two or three, you must answer them unanimously. In other words, you must answer them 'yes,' if it is your decision that the death penalty should be invoked by the Court; not by you. It is mandatory on the part of the Judge to enter the sentence.

It is thus clear that the focus of the sentencing deliberations was in petitioner's case, was intended to be, and -- in view of the enormity of the issue at stake and the amorphous character of the questions under consideration -- will inevitably be, the question whether the defendant should live or die.[47/]

3. Executive Clemency

Article IV, Sec. 11 of the Texas Constitution gives the governor, acting on the recommendation of the Board of Pardons

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47/ At the time of Furman v. Georgia, several states had limitations on the jury's discretion to make the life-death choice and standards for the appropriate exercise of that discretion. Death sentences from these states were nevertheless uniformly held unconstitutional. Davis v. Connecticut, 408 U.S. 935 (1972)(see Conn. Gen. Stat. Ann., §52-10); Moore v. Illinois, 408 U.S. 786 (1972)(see People v. Black, 367 Ill. 209, 10 N.E.2d 801, 804 (1937); People v. Sullivan, 345 Ill. 87, 177 N.E. 733 (1933); Ill. Rev. Stat., c. 38, §1-7-(c)(1); Alvarez v. Nebraska, 408 U.S. 937 (1972)(see Sundahl v. State, 154 Neb. 550, 48 N.W.2d 689, 704 (1951); Billingsley v. New Jersey, 408 U.S. 934 (1972)(see N.J. Stat. Ann., §2A:113-4 (1969); State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963)); Duling v. Ohio, 408 U.S. 936 (1972)(see State v. Tudor, 154 Ohio St. 249, 95 N.E.2d 385, 390 (1950); State v. Eaton, 19 Ohio St. 145, 249 N.E.2d 897 (1969)); Herron v. Tennessee, 408 U.S. 939 (1972)(see Tenn. Code Ann., §39-2406 (1955); Woodruff v. State, 164 Tenn. 530, 51 S.W.2d 843, 847 (1932).

and Paroles, the unlimited authority to grant commutations in all criminal cases except treason and impeachment.[48/] There is no restriction upon the discretion of the executive branch to grant or deny clemency in any case nor is that discretion informed by any standards. The Legislature, which has the "power to regulate procedure before the Board of Pardons and Paroles" and to require that it keep records, has added to the Constitutional scheme only a requirement that

> When the Governor remits fines or forfeitures, or grants reprieves, commutation of punishment or pardons, he shall file in the office of the Secretary of State his reasons therefor.

Vernon's Texas Code of Criminal Procedure Ann., Article 48.02 (1966). And, in Stanley v. State, 490 S.E.2d 828 (1973) the Court of Criminal Appeals held that a pardon was not invalid for the Governor's failure to file his reasons therefor where

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48/ Article IV., Sec. 1 of the Texas Constitution provides (in pertinent part):

> In all criminal cases, except treason and impeachment, the Governor shall have the power, after conviction, on the written signed recommendation and advice of the Board of Pardons and Paroles, or a majority thereof, to grant reprieves and commutations of punishment and pardons; and under such rules as the Legislature may prescribe, and upon the written recommendation and advice of a majority of the Board of Pardons and Paroles, he shall have the power to remit fines and forfeitures. The Governor shall have the power to grant one reprieve in any capital case for a period not to exceed thirty (30) days; and he shall have power to revoke paroles and conditional pardons. With advice and consent of the Legislature, he may grant reprieves, commutations of punishment and pardons in cases of treason.

Vernon's Texas Constitution Ann. (1955).

> the Governor stated his reasons in his proclamation in these words: '. . . acting upon and because of the recommendation of the Board of Pardons and Paroles dated September 11, 1972.' We hold that such reasons comply with Art. 4, Sec. 11, Texas Constitution, and Art. 48.02 V.A.C.C.P. 490 S.W.2d at 834.

Texas Governors have, by the exercise of this clemency power, spared the lives of a substantial proportion of condemned prisoners. Between 1950 and 1962 there were ninety-four executions in Texas and twenty-two commutations of capital sentences.[49] Thus, the lives of nearly one-fifth of all persons convicted of capital crimes were spared by the exercise of clemency over a twelve year period.

The capital defendant who fails to escape the death penalty during the charging, plea bargaining, guilt determination and sentencing process is thus subjected to a final lottery in which the Executive Department, "in its own discretion and without violating its trust or any statutory policy" may refuse to permit execution "no matter what the circumstances of the crime."[50] Furman, supra, 408 U.S. at 314 (opinion of Mr. Justice White).

49/ Note, Executive Clemency in Capital Cases, 39 N.Y.L.U. REV. 136, 192 (1964).

50/ The Texas Court of Criminal Appeals had held that where a death sentence cannot stand because of constitutional infirmities in its imposition, a commutation of the death sentence to life by the Governor obviates the need for a new trial either on guilt or punishment. Whan v. State, 485 S.W.2d 275 (1972), cert. denied 411 U.S. 934 (1973). See, also, Stanley v. State, 490 S.W.2d 828 (Tex. Cr. App. 1973). However, since that Court "is without authority to direct a new trial before a different jury on the issue of punishment only" Ellison v. State, 432 S.W.2d 955, 957 (Tex. Cr. App. 1968), it has been required in the absence of gubenatorial commutation to order new trials where the death sentence is found to have been unconstitutionally imposed. It is therefore possible, as was pointed out by Judge Oinin dissenting in Whan v. State, supra, for the Executive branch

The preceding review of the post-Furman v. Georgia modifications in Texas capital procedures reveals that discretionary opportunities for imposition or avoidance of the penalty are, in fact, as numerous and as unregulated as in the pre-June 29, 1972 period. It is not surprising that only a handful of defendants have been condemned (21 in more than two years)[51] in a State which reported 1,501 murders and non-negligent manslaughters in 1973 alone.[52] Of course, the point is not only that the death penalty continues to be imposed so rarely in such an insignificant fraction of eligible cases that its regular and even-handed use and its general acceptance as a functioning part of the State's criminal law machinery are called into question. The more fundamental defect is that the arbitrary selectivity condemned in Furman v. Georgia has been carefully

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50/[Continued]

> to intervene and prevent a retrial and substitute their idea of what punishment should be assessed rather than a jury and to do so upon a selective basis among cases reversed by the United States Supreme Court at the same time upon the same grounds.

485 S.W.2d at 280.

51/ See note 16, supra.

52/ UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 1973 (1974) at 74. These totals are reported crimes, not convictions, and they cannot be said to represent the total of murders reported in Texas in 1973 for which a death sentence might be imposed. (The State of Texas reported 15 killings of law enforcement officers in 1973, more than in any other state save California, Id. at 45.)

preserved in these modified capital procedures. After Furman, Texas "was confronted with the serious task of devising a new . . . system consonant with her own political ideas but also consistent with the Federal Constitution." Lane v. Wilson, 307 U.S. 268, 275 (1938). The question now presented for this Court's consideration is whether the 1973 statute "partakes too much of the infirmity" of the pre-Furman v. Georgia system "to be able to survive." Ibid.

B. The Inconsistency of the Death Penalty With Contemporary Standards of Decency

In addition to the question whether the Texas capital punishment statute has successfully eliminated arbitrary selectivity in the imposition of the death penalty, a significant question is presented as to whether this penalty is per se inconsonant with contemporary standards of decency embodied in the Eighth Amendment. For the reasons stated in Part I-D of the Petition for a Writ of Certiorari in Dillard v. North Carolina, No. 73-6875 (filed June 11, 1974) at 45-51 (attached hereto as Appendix B), petitioner urges that certiorari here be granted on the issue of the consistency vel non of the punishment of death with those "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 100 (1958)(plurality opinion of Chief Justice Warren).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ADMISSION AT TRIAL OF PETITIONER'S WRITTEN CONFESSIONS WAS CONSISTENT WITH FEDERAL STANDARDS PROTECTING RIGHTS SECURED BY THE FOURTH, FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Petitioner, a man with an I.Q. in the range of borderline mental retardation, was arrested without a warrant in the early hours of the morning and held without preliminary arraignment until he had incriminated himself orally. He was taken before a magistrate at 10:15 that same evening at which time he was told that he was charged with "murder with malice" but was not informed of the possibility of a capital charge and conviction. He was thereafter interrogated until a written confession was secured at 1:15 the following morning. Thereafter, without being told that his life was at stake in the proceedings against him, he was further interrogated until a second written statement was obtained which arguably contained an admission that the crime was committed under circumstances that raised it to the category of capital murder. At no time prior to the taking of these statements was petitioner given an opportunity to see and talk with counsel, with members of his family, or with anyone in a position to represent his interests. These circumstances raise the question whether the use of the statements was consistent with the protection of rights secured by the Foufth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

Petitioner's principal claim here is that these circumstances were unduly coercive and precluded knowing, intelligent, voluntary waiver of his rights to remain silent and to be

assisted by counsel. "A confession by which life becomes forfeit must be the expression of free choice." Watts v. Indiana, 338 U.S. 49, 53 (1948)(Plurality Opinion of Mr. Justice Frankfurter). In determining the voluntariness of a confession, it is necessary to weigh "the circumstances of pressure against the power of resistance of the person confessing." Stein v. New York, 346 U.S. 156, 185 (1952). Repetitions of warnings regarding the use that might be made of incriminating statements and of advice regarding the petitioner's right to remain silent and his right to counsel "must be viewed in the light of the facts concerning petitioner's mentality and experience . . ." Fikes v. Alabama, 352 U.S. 191, 193 (1957).

"Prolonged detention without . . . preliminary appearance before a magistrate,[53/] the lack of counsel before, during, or after arraignment, and confession to the police in private[54/] are . . . elements that should be considered in determining whether a confession, permitted to be introduced and relied upon at a trial, has been obtained under such circumstances that its use violates due process," Gallegos v. Nebraska, 342 U.S. 55, 65 (1951): each of those factors is present here, and they,

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53/ Although petitioner had been in custody throughout the business hours of August 17, 1973, he was not taken before a magistrate until 10:15 p.m. Prior to that time he had orally admitted his guilt and led police to the spot where the body was found. Petitioner could not, of course, have understood without benefit of counsel the different legal consequences of the earlier oral admissions and the subsequent written, signed statements. See, Vernon's Texas Code of Crim. Procedure, Art. 38.22 (1966).

54/ Indeed, "[w]hatever the testimony of the authorities as to waiver of rights by an accused" the fact that his statement was made after "lengthy interrogation or incommunicado incarceration . . . is inconsistent with any notion of voluntary relinquishment of the privilege." Miranda v. Arizona, 384 U.S. 436, 476 (1966).

taken together with petitioner's severely limited mental capacity, his suggestibility, the time and circumstances of his apprehension, the timing and frequency of the periods of interrogation, and the "location and conditions of his incarceration", Fikes v. Alabama, supra, 352 U.S. at 197, clearly raise the question whether his rights to remain silent and have benefit of counsel were intelligently and voluntarily waived,[55/] or the statements were the product of unlawful coercion.

The conditions of petitioner's arrest[56/] also raise the question whether a confession obtained from one in custody pursuant to an unlawful arrest is -- as the holding of Wong Sun v. United States, 371 U.S. 471 (1963) implies, and the opinion in Morales v. New York, 396 U.S. 102 (1969) appears to assume -- inadmissable on that ground alone, or -- as the Court below held -- admissible (assuming a finding of voluntariness) "even though the arrest may have been under invalid process or without

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55/ The ambiguities of the capital punishment statutes under which petitioner was convicted make the need for counsel particularly urgent "lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." Tomkins v. Missouri, 323 U.S. 485, 489 (1944). Although mistake or arbitrariness is inevitable under such schemes, see BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 18-19 (1974), the dangers of wrongful imposition of the ultimate penalty are heightened where counsel is provided "at such time or under such circumstances as to preclude the giving of effective aid in the presentation and trial of the case." Powell v. Alabama, 287 U.S. 45, 71 (1932).

56/ Although the Court of Criminal Appeals cited what it termed "ample evidence to detain, question and arrest" petitioner, Jurek v. State, supra, 504 S.W.2d at 942, the record does not indicate that any of the evidence cited, save the identification of the Jurek pick up as one at which the victim had stopped to converse with the driver earlier in the day, was known to the arresting officers (or to any other officials) at the time of petitioner's apprehension. Evidence discovered subsequent to an arrest will not, of course, serve to justify it. Bech v. Ohio, 379 U.S. 89 (1964), Henry v. United States, 361 U.S. 89 (1964). The record is similarly silent as to the validity of an unrelated, outstanding warrant for petitioner's arrest the existence of which was offered as a "reason for keeping . . . [petitioner], or placing him under arrest and keeping him in custody . . ." (T. 1767) (emphasis supplied) and the existence of which was confirmed after petitioner's arrest (T. 1768-69).

any process or legal right." Jurek v. State, supra, 522 S.W.2d at 941, citing Simmons v. State, 504 S.W.2d 465 (Tex. Cr. App. 1974).

C O N C L U S I O N

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX A

Jerry Lane JUREK, Appellant,
v.
The STATE of Texas, Appellee.
No. 49416.

Court of Criminal Appeals of Texas.
April 16, 1975.
Rehearing Denied May 7, 1975.

Defendant was convicted in the 24th Judicial District Court, DeWitt County, Joe E. Kelly, J., of murder and sentenced to death and he appealed. The Court of Criminal Appeals, Morrison, J., held that Texas death statutes are not unconstitutional; that indictment, which alleged that defendant committed capital murder while in the course of attempted kidnapping, kidnapping, and forcible rape was not duplicitous; and that evidence sustained finding that defendant's confession was voluntary.

Affirmed.

Onion, P. J., concurred in the result.

Odom, J., concurred in part and dissented in part and filed an opinion.

Roberts, J., dissented and filed an opinion.

1. Criminal Law ⇐1206(1)

Texas statutes under which death penalty can be considered by the jury for murder only in five enumerated situations and under which jury must also determine beyond a reasonable doubt that death was caused deliberately that there was a probability that defendant would commit criminal acts of violence which would constitute a continuing threat to safety, and that killing was unreasonable in response to provocation, if any, by the deceased provide effective guidance to the jury, adequately limit the discretion of the jury, and adequately guard against arbitrary and wanton imposition of the death penalty and are

thus constitutional. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.) Vernon's Ann. P.C. art. 1257; Vernon's Ann.C.C.P. art. 37.071.

2. Criminal Law ⇐1206(1)

Fact that an exhaustive and precise list of factors is not specifically included in statute delineating factors which jury is to consider in determining whether to impose a death penalty does not indicate that the jury is without adequate guidelines. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.) Vernon's Ann.C.C.P. art. 37.071.

3. Criminal Law ⇐1206(1)

If discretion in the assessment of punishment of death under a statute can be shown to be reasonable and controlled, rather than capricious and discriminatory, the statute is not unconstitutional. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.) Vernon's Ann.C.C.P. art. 37.071.

4. Indictment and Information ⇐127

Indictment may contain as many counts charging the same transaction as the drafter deems necessary to meet the variations of proof. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

5. Homicide ⇐139
Indictment and Information ⇐125(29)

Since murder punishable by death occurs only when the offense is committed under one of five circumstances set forth in statute and, if none of the elements is present, punishment for the offense may be no more than life imprisonment, it is essential, in order to fully apprise the accused of the charge against him, that indictment for capital murder allege one of the conditions; indictment which alleged that defendant intentionally with malice aforethought killed his victim in the course of committing and attempting to commit kidnapping and forcible rape upon the victim was proper and was not duplicitous. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.) Vernon's Ann.P.C. art. 1257; Vernon's Ann.C.C.P. art. 37.071; V.T.C.A., Penal Code, § 19.03.

6. Indictment and Information ⇐125(29)

Fact that each count of indictment which charged defendant with murder included the presence of more than one of the aggravating conditions necessary for imposition of death penalty did not render the indictment duplicitous. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.) Vernon's Ann.C.C.P. art. 1257(b)(2).

7. Indictment and Information ⇐125(19)

Where several ways in which an offense may be committed are set forth in a statute, are embraced in the same definition, are punishable in the same manner, and are not repugnant to each other, they are not distinct offenses and may be charged in one indictment. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

8. Indictment and Information ⇐125(29)

Attempted kidnapping, kidnapping, and forcible rape are not repugnant to each other and, as each constitutes a manner in which capital murder may be committed, they were properly alleged in one indictment charging defendant with capital murder. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.) Vernon's Ann.P.C. art. 1257(b)(2).

9. Criminal Law ⇐519(3, 8)

Confession, otherwise shown to have been voluntary, is not rendered inadmissible by the fact that its author was under arrest or in custody at the time, even though the arrest may have been under invalid process or without any process or legal right. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

10. Arrest ⇐63.4(18)
Criminal Law ⇐519(8)
Municipal Corporations ⇐188

Evidence that defendant had been seen talking with deceased in park, that deceased was thereafter seen riding in the back of defendant's unusually colored pickup, screaming for help, as it sped through town, that deceased was later reported missing, that there was an outstanding warrant for defendant's arrest on another charge, and that the outstanding warrant was verified soon after defendant's arrest in connection with disappearance of victim, authorized police officers to detain, question and arrest defendant, so that defendant's confession was not inadmissible on theory that he was illegally arrested. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

11. Criminal Law ⇐519(8)

Failure to take an accused immediately before a magistrate does not necessarily vitiate a confession properly obtained prior thereto. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

12. Criminal Law ⇐519(8)

Unreasonable delay in bringing an accused before a magistrate only renders the confession inadmissible upon a showing of some causal connection between the delay and the making of the confession. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

13. Criminal Law ⇐519(8)

In the absence of evidence that defendant's detention contributed to the making of his two confessions, they were not inadmissible on theory that he was not immediately brought before a magistrate after his arrest. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

14. Criminal Law ⇐531(3)

Evidence that defendant was arrested at 1:15 a. m., that he was questioned for approximately 45 minutes at police headquarters and was then placed in a cell and left alone until the next morning, when county attorney questioned him for approximately 15 minutes, that he was later taken to another city where polygraph test was performed and that he admitted murdering victim during the polygraph examination that, on the following day, defendant gave his first confession upon being questioned by district and county attorneys, that defendant was repeatedly warned of his Miranda rights, and that defendant was not deprived of food or sleep demonstrated that his confession was voluntary. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

15. Criminal Law ⇐1158(4)

Absent undisputed evidence which would render the confession inadmissible as a matter of law, reviewing court will not reverse findings of trial judge and jury as to voluntariness of confession. (Per Morrison, J., with one Judge concurring and one Judge concurring in the result.)

George I. Middaugh & Emmett T. Summers, III, Cuero, for appellant.

Wiley L. Cheatham, Dist. Atty., Cuero, Jim D. Vollers, State's Atty., and David S. McAngus, Asst. State's Atty., Austin, for the State.

OPINION

MORRISON, Judge.

The offense is murder; the punishment, under Article 1257, Vernon's Ann.P.C.[1]

1. As amended, Acts 1973, 63rd Leg., p. 1122, ch. 426, Article 1, Sec. 1, eff. June 14, 1973. August 16, 1973. This is the first case to of the new Texas Penal Code, Acts 1973, 63rd Leg., ch. 399, eff. January 1, 1974. Section 19.03 of the new Penal Code is substantially

and Article 37.071, Vernon's Ann.C.C.P.,[2] death.

The offense occurred in Cuero. The record reflects that after spending the late afternoon drinking beer, the 22 year old appellant made repeated efforts to engage 10 year old Wendy Adams in conversation at the Cuero City Park. They were next seen as appellant sped through town in his pickup, the child in back screaming for help. The pickup halted near Hell's Gate Bridge, which spans the Guadalupe River at the outskirts of Cuero, where appellant attempted to make sexual advances to the child. Rebuffed, he began to choke the girl. When she lost consciousness, he threw her into the river. The child's body was recovered from the river two days later.

We are met at the outset with appellant's contention that the assessment of the death penalty under Article 1257, supra, and Article 37.071, supra, is cruel and unusual punishment under the holding of the Supreme Court of the United States in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 32 L.Ed.2d 346, (1972), and the Eighth and Fourteenth Amendments of the United States Constitution.

Furman is lengthy and complex. There are nine separate opinions. Five Justices comprise the majority; four Justices dissenting. Of the five Justices who joined in the majority, no two concurred for the same reason. Such diversity makes generalization difficult. However, some conclusions may be drawn.

Two Justices in the majority concluded that the death penalty is cruel and unusual punishment under the Eighth Amendment.[3] Three other Justices, who concurred in the majority, did not conclude the death penalty was unconstitutional per se. Rather, they condemned as they see it, the arbitrary, capricious and standardless manner in which juries impose the death penalty. They rejected the concept of uncontrolled discretion in the jury to impose the death penalty or some lesser penalty.[4]

Furman, then does not seem to ban the assessment of the death penalty per se or to eliminate all sentencing discretion. It seems reasonable to conclude that there are seven Justices—the four dissenters and these latter three members of the majority—who would permit the imposition of the death penalty, if the statutes under which it was imposed were properly drawn.

similar to Article 1257 of the old code. The indictment alleged the date of the offense as August 16, 1973. This is the first case to reach this Court under either statute.

2. Added by Acts 1973, 63rd Leg., p. 1125, ch. 426, Art. 3, Sec. 1, eff. June 14, 1973.

3. Justice Brennan concluded:
"Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of [an analysis of] these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not."
Justice Marshall stated:
". . . capital punishment violates the 8th Amendment because it is morally unacceptable to the people of the United States at this time in their history."

4. Justice Douglas wrote:
"Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or twelve."
Justice Stewart said:
"I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and freakishly imposed."
Justice White concluded:
"In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative 'policy' is thus necessarily defined not by what is legislatively authorized, but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment."

[1] Article 1257, supra, and Article 37.071, supra, were enacted in response to *Furman*. The question before us is whether these statutes are valid under that holding. Do they provide effective guidance to the jury? Do they adequately limit the discretion of the jury? Do they guard against the arbitrary and standardless imposition of the death penalty?

We hold they do.

Article 1257, supra, states:

"(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

(1) the person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under Subsection (a) of this Article or of any other lesser included offense.

(d) If one of the circumstances or conditions enumerated in Subsection (b) of this Article is charged in an indictment, the prospective jurors shall be informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged. No person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact."

Article 37.071, supra, states:

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection may not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against the sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately

and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue 'yes' unless it agrees unanimously; and

(2) it may not answer any issue 'no' unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals."

First, Article 1257, supra, limits the circumstances under which the State may seek the death penalty to a small group of narrowly defined and particularly brutal offenses. This insures that the death penalty will only be imposed for the most serious crimes. It also insures that the death penalty will only be imposed for the same type of offenses which occur under the same types of circumstances.

Article 37.071, supra, further limits the standardless imposition of the death penalty. It provides for a separate sentencing procedure to determine punishment, once the accused has been found guilty of a most serious crime. It limits the jury's discretion on the range of punishment to life imprisonment or death. A jury may no longer choose from a range of two years to life to death. Further, in order to impose the death penalty, the jury must find beyond a reasonable doubt and must respond affirmatively to two or three questions, depending on the circumstances. These questions direct and guide their deliberations. They channel the jury's consideration on punishment and effectively insure against the arbitrary and wanton imposition of the death penalty.

Lastly, the statute provides for swift and mandatory appellate review.

[2] We reject appellant's contention that Article 37.071(b), supra, is too vague to provide adequate guidance to the jury. The fact that an exhaustive and precise list of factors is not specifically included does not indicate that the jury is without adequate guidelines. We are inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula[5] However, there are some factors which are readily apparent and are viable factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing

5. Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, para. 498, p. 174 (1953).

threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand.

Looking to other jurisdictions with post-Furman death penalty statutes, we find that the Supreme Courts of Florida[6] and Georgia[7] have upheld statutes with non-mandatory death penalty provisions based on the theory that the statutes adequately provide control of the jury's discretion and safeguards against the arbitrary impositions of the death penalty.[8]

[3] Some discretion is inherent and desirable in any system of justice, from arrest to final judgment. See *Dixon* and *Coley*. The mere presence of discretion in the sentencing process does not render that procedure violative of *Furman*. It is rather the quality of discretion and the manner in which it is applied that must be controlled. To eliminate all discretion on the part of the jury would be to risk elimination of that valuable element which permits individualization based on consideration of all extenuating circumstances and would eliminate the element of mercy, one of the fundamental traditions of our system of criminal jurisprudence.[9] If discretion in the assessment of punishment under a statute can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman* will be met.

After considerable reflection, we find that the statutes with which we are confronted today do meet this test.

Appellant next charges the court erred in failing to grant his motion to quash the indictment. Appellant argues that the indictment is duplicitous. He contends that each count of the indictment charges him with four separate and distinct offenses, murder, attempted kidnapping, kidnapping, and forcible rape, in violation of Article 21.24, V.A.C.C.P.[10] and Article 1, Section 10 of the Texas Constitution, Vernon's Ann.St.[11]

The indictment[12] contains four counts. Count one, omitting the formal parts alleges:

"Jerry Lane Jurek . . . unlawfully, voluntarily, intentionally, and with [illegible]

6. State v. Dixon, 283 So.2d 1 (Florida 1973).

7. Coley v. State, 231 Ga. 829, 204 S.E.2d 612 (1974).

8. Three other state courts of last resort have also passed on the question of the death penalty in the post-Furman era. Those statutes, however, were held to be mandatory ones, and therefore not helpful to our consideration. See Jefferson v. Commonwealth, 204 S.E.2d 258 (Virginia 1974); State v. Jarrett, 284 N.C. 625, 202 S.E.2d 721 (1974); State v. Dickerson, 298 A.2d 761 (Delaware 1972). For other post-Furman decisions, see Winkle v. State, 528 P.2d 467 (Utah 1975) and Commonwealth v. Harrington, 323 N.E.2d 885 (36 Cr.L. 2506) (Mass.1975).

9. Discretion and the Constitutionality of the New Death Penalty Statutes, 87 Harv.Law Rev. 1620 (1974). The author is impressed with the logic presented in this commentary. See also Is the Death Penalty Dead?, 26 Baylor Law Rev. 114 (1974).

10. Article 21.24 provides: "An indictment, information or complaint may contain as many counts charging the same offense as the attorney who prepares it, acting in good faith, may think necessary to insert, but may not charge more than one offense."

11. Texas Const. Art. I, Section 10 (1918) states that: "He [the accused] shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof."

12. For suggested forms under the New Texas Penal Code, see Morrison and Blackwell, New Penal Code Forms, sec. 19.0311, pp. 8-9 and Branch's Annotated Penal Code, Interim Pamphlet With Forms and Analyses, sec. 19.03, pp. 109-110.

ice aforethought killed Wendy Adams by choking and strangling her with his hands, and by drowning her in the water, by throwing her into a river, and that said Jerry Lane Jurek, was then and there in the course of committing and attempting to commit kidnapping of and forcible rape upon the said Wendy Adams . . . ."

[4] The other three counts of the indictment charge the same acts in more detail and with slight variations. An indictment may contain as many counts charging the same transaction as the drafter deems necessary to meet variations in the proof. Ex parte Easley, Tex.Cr.App., 490 S.W.2d 570.

Article 1256, V.A.P.C., defines murder. Article 1257(a) and (b), V.A.P.C., prescribes the punishment for that offense. The portions of that statute, pertinent to this discussion, are:

"(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

(1) . . .

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape or arson . . . ."

[5] Capital murder, murder punishable under Article 1257(b) supra, occurs when the offense is committed under one of the circumstances set forth in that subsection. If one of these elements is not present, punishment for the offense falls under 1257(a). It is therefore essential, in order to fully apprise the accused of the charge against him, that an indictment for capital murder allege one of the conditions in Article 1257(b), supra.

[6-8] Further, the fact that each count of the indictment includes the presence of more than one of the aggravating conditions set forth in Article 1257(b)(2), does not render the indictment duplicitous either. Where several ways an offense may be committed are set forth in a statute and are embraced in the same definition, are punishable in the same manner, and are not repugnant to each other, they are not distinct offenses, and may be charged in one indictment. Nicholas v. State, 23 Tex.App. 317, 5 S.W. 239; Ferguson v. State, 80 Tex.Cr.R. 383, 189 S.W. 271; Todd v. State, 89 Tex.Cr.R. 99, 229 S.W. 515. Attempted kidnapping, kidnapping and forcible rape are not repugnant to each other.

In Floyd v. State, 164 Tex.Cr.R. 50, 296 S.W.2d 523, we quote McArthur v. State, 132 Tex.Cr.R. 447, 105 S.W.2d 227, in which we concluded:

"The rule seems well settled that, if but one transaction is involved, and the offense be one which may have been committed in any one of several ways, the pleader may charge in the indictment in one count that such offense had been committed by doing this, and that, and the other, and there will be no duplicity . . . ."

The indictment is not duplicitous.

Appellant's remaining grounds of error challenge the admissibility of his confession. Initially, he questions the legality of his arrest and charges the court erred in admitting any statements made as the result of his illegal arrest.

[9] However, it is not necessary to pass on the legality of the arrest. "A confession, otherwise shown to have been voluntary is not rendered inadmissible by the fact that its author was under arrest or in custody at the time, even though the arrest may have been under invalid process or without any process or legal right." Simmons v. State, Tex.Cr.App., 501 S.W.2d 465; Morgan v. State, Tex.Cr.App., 502

S.W.2d 722; Lacefield v. State, Tex.Cr.App., 412 S.W.2d 906.

[10] Nevertheless, the record reflects that the authorities had ample evidence to detain, question and arrest appellant. On the afternoon of the homicide, witnesses saw appellant, in his patchwork and haphazardly painted pickup, talking with the deceased in the Cuero City Park, where she had gone swimming. Shortly thereafter witnesses saw her riding in the back of this unusually colored pickup, screaming for help, as it sped through town. A relative soon reported her missing, and the search for her ensued. That evening, one of the witnesses who had seen this particular pickup at the park, identified it as the truck parked at appellant's residence. Appellant was therefore a logical person to question about the missing child's whereabouts.

The evidence further shows that the officers who arrested appellant were aware of an outstanding warrant for appellant's arrest in New Braunfels, which they verified soon after his arrest.

Next appellant claims that the State's failure to take him before a magistrate immediately after his arrest affects the validity of his confession. Appellant does not contend that he was not warned under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694. He claims that the mere fact that he was not immediately taken before a magistrate vitiates the validity of his confession.

[11-13] Failure to take an accused immediately before a magistrate does not vitiate a confession properly obtained prior thereto. Webb v. State, 415 F.2d 443, cert. den., 396 U.S. 1019, 90 S.Ct. 587, 24 L.Ed.2d 511. Unreasonable delay in bringing an accused before a magistrate only renders the confession inadmissible upon a showing of some causal connection between the delay and the making of the confession. Simmons v. State, supra; Lester v. State, Tex.Cr.App., 490 S.W.2d 573; Creswell v. State, Tex.Cr.App., 387 S.W.2d 887; Smith v. State, 171 Tex.Cr.R. 313, 350 S.W.2d 344, cert. den., 366 U.S. 883, 82 S.Ct. 126, 7 L.Ed.2d 83. There is no showing that the detention contributed to the making of appellant's two confessions.

[14] Lastly, appellant claims his confessions were involuntary. He argues the record fails to show he "voluntarily, knowingly and intelligently" waived his constitutional rights. Appellant cites his limited mental capacity and the length and conduct of the interrogation which led to the confessions as factors which indicate the confessions were involuntary.

Appellant was arrested at 1:15 a. m. on August 17, approximately six hours after the child's disappearance. At police headquarters, the two arresting officers read appellant his *Miranda* warnings, and questioned him for approximately 45 minutes. He denied any knowledge concerning the child's whereabouts. At 2:30 a. m., he was placed in a jail cell, which contained a bed, and was left alone until the next morning, when the county attorney, who also read appellant his *Miranda* warnings, questioned him for approximately 15 minutes. He continued to deny any knowledge about the child's whereabouts. Two or three other officers spoke with him briefly during the morning.

Later in the day, two officers took appellant to Austin for a polygraph test. During the examination, he admitted murdering the girl. Her body was later recovered on the basis of information supplied by appellant at this time. The officers arrived back at Cuero with appellant at approximately 9:30 a. m. He was immediately taken before Magistrate Albert Ley, who read appellant his rights from a magistrate's certificate. Approximately four hours later, after being questioned by the district attorney and the county attorney, appellant gave his first confession. The confession stated that he killed the child because she made derogatory comments about his family. He was taken to

the County Jail at Victoria at about 1:15 a. m.[13] He was returned to Cuero at 2:00 p. m. and gave his second confession at 7:30 that evening after again speaking with the district attorney and the county attorney and several others. In the confession he stated that he had not told the complete truth in his earlier statement and that he killed the girl because she refused his sexual advances.

The record reflects that appellant was repeatedly warned of his constitutional rights under *Miranda*. There is no evidence in the record that appellant was deprived of food or sleep, or that he was not in complete control of his faculties when he gave the confessions. He was left alone in his cells between interrogations and was offered food and beverages at various times during this two day period. There is evidence that he was alert enough to make minor corrections in the confessions before signing them.

The court conducted a separate hearing on the motion to suppress the two written confessions. Appellant did not testify either at the hearing on the motion to suppress or at the trial on the merits. The court entered an order finding that the confessions were voluntarily given. Furthermore, the court submitted the question of the voluntariness of the confessions to the jury in its charge.

[15] Absent undisputed evidence which would render the confession inadmissible as a matter of law, the Court will not reverse the findings of the trial judge and jury as to the voluntariness of the confession. Lisenba v. California, 314 U.S. 219, 62 S.Ct. 280, 86 L.Ed. 166; Jacks v. State, 167 Tex.Cr.R. 1, 317 S.W.2d 731; Scanlin v. State, 165 Tex.Cr.R. 183, 305 S.W.2d 357; McHenry v. State, 163 Tex.Cr.R. 436, 293 S.W.2d 773.

The record amply supports the finding of the court and the jury adversely to appellant. Compare Kendrick v. State, Tex. Cr.App., 481 S.W.2d 877; Grayson v. State, Tex.Cr.App., 438 S.W.2d 553.

Finding no reversible error, the judgment is affirmed.

ONION, P. J., concurs in the results.

ODOM, J., concurs, in part and dissents in part.

ROBERTS, J., dissents.

ODOM, Judge (concurring in part and dissenting in part).

At the outset I wish to state that I concur in the opinion of the majority that the death penalty is not unconstitutional. This Court has held and today continues to hold that the death penalty is a constitutionally permissible punishment. Tezeno v. State, Tex.Cr.App., 484 S.W.2d 374, 377; Williams v. State, Tex.Cr.App., 427 S.W.2d 868. The only point upon which I take issue with the majority is their interpretation of Article 37.071, V.A.C.C.P. The point at which I must part company with the majority is not on the constitutionality of the death penalty, but on the effect and meaning of the statute before us.

The majority interpret Article 37.071, V.A.C.C.P., as limiting the jury's "discretion on the range of punishment to life imprisonment or death," saying that the "two or three questions" asked by Art. 37.071 "direct and guide their [the jury's] deliberation," channeling "the jury's consideration on punishment." Article 37.071 prescribes a very distinct and rigid method for determining whether the punishment shall be death or life imprisonment.

"Art. 37.071. Procedure in Capital Case

"(a) Upon a finding that the defendant is guilty of a capital offense, the court *shall* conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. . . .

"(b) On conclusion of the presentation of the evidence, the court *shall* submit the following issues to the jury:

. . .

"(c) . . . they jury *shall* return a special verdict of 'yes' or 'no' on each issue submitted.

". . .

"(e) If the jury returns an affirmative finding on each issue submitted under this article, the court *shall* sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court *shall* sentence the defendant to confinement in the Texas Department of Corrections for life." (Emphasis supplied.)

Where is the "discretion" referred to in the majority opinion? Each pertinent portion of Art. 37.071 uses "shall", the command form, rather than the permissive "may." The jury is required to answer special issues. These questions each require a factual determination by the jury. If the fact questions are answered in the affirmative, pronouncement of a sentence calling for the ultimate penalty is absolutely mandated by Art. 37.071. The word "shall" in Art. 37.071 inflexibly requires certain procedures to be followed, allowing no discretion in determining the punishment to be received by a defendant who is guilty of capital murder.

Before a person may serve as a juror, he must state under oath that the mandatory penalty of death or life imprisonment will not affect his deliberations on any issue of fact. Art. 1257(d), V.A.P.C. In order to grant "mercy"[1] in a particular case, the jurors must ignore their oaths and return a deliberately falsified answer to one of the fact issues in Art. 37.071(b). Unless this Court is to presume that jurors will ignore their oaths and return perjured answers to one or more of the issues, a complete prevarication, solely to arrive at the result they may feel is proper in a given case, we must hold this statute is mandatory, leaving no discretion to the jury in the matter of assessing punishment.

The death penalty is mandatory upon affirmative answers to fact questions, which must be decided free from any consideration of the resulting penalty. The statute is mandatory, not discretionary, as asserted by the majority.

In discussing the contention that Article 37.071(b) is too vague, the majority assert that "the factors which determine whether the sentence of death is an appropriate penalty in a particular case are *too complex to be compressed within the limits of a simple formula*." (Emphasis supplied.) Do not the majority, by this statement, recognize the inherent vagueness of Art. 37.071(b)? Somehow the majority seem to equate vagueness with discretion. The majority admit that Art. 37.071(b) does not contain an exhaustive and precise list of factors, but appear to reason that since all factors which determine whether the death sentence is appropriate in a particular case are too complex to be listed, a vague statute becomes "discretionary", and that some discretion is "inherent and desirable." The fact that discretion is "inherent and desirable" does not render a vague statute any less vague. The majority have erred in mistaking the vagueness of this mandatory statute for discretion.

Having mistaken vagueness for discretion, the majority naturally have failed to recognize the vagueness inherent in Art. 37.071(b)(2). The word "probability" is not examined by the majority. This concept is at the core of the issue submitted

13. County officials suggested and appellant agreed that he be taken to Victoria, the county adjoining the one in which the offense occurred. The record reflects the deceased child's father was a Cuero police officer whose work took him in and out of the Cuero jail frequently.

1. "Mercy" is described by the majority as "one of the fundamental traditions of our system of criminal jurisprudence."

under this subsection, yet the majority seek neither to define it nor to discuss its meaning. The essential indefiniteness of the word "probability" is ignored.

One of the necessary conditions upon which assessment of death under Article 37.071, supra, must rest is a jury finding beyond a reasonable doubt that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Art. 37.071(b)(2), supra.

This provision basing the imposition of capital punishment upon the probability of future events appears to be unique to this State. A survey of the capital punishment statutes of other states fails to reveal any provision similar to the "probability" issue of Article 37.071. In all the statutes reviewed, the aggravating circumstances, upon which imposition of the death penalty rests, concern either *prior* acts of criminal conduct or the means or circumstances surrounding the commission of the offense for which the accused is on trial.[2]

What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists a "probability" that he will perform certain acts in the future? Did it mean, as the words read, is there *a* probability, some probability, any probability? We may say there is a twenty percent probability that it will rain tomorrow, or a ten or five percent probability. Though this be a small probability, yet it is some probability, a probability, and no one would say it is no probability or not a probability. It has been written: "It is probable that many things will happen contrary to probability,"[3] and "A thousand probabilities do not make one fact."[4] The statute does not require a particular degree of probability but only directs that *some* probability need be found. The absence of a specification as to what degree of probability[5] is required is itself a vagueness inherent in the term as used in this issue. Our common sense understanding of the term leaves the statute too vague to pass constitutional muster.

In a recent text on statistics,[6] probability is defined as follows:

"The probability of an event may be defined as the number of *favorable* events divided by the number of *possible* events. Suppose we roll one die, which has six sides, along the floor and observe which face ends up on top. If the die is perfectly balanced, all faces (1 to 6) have an equal chance of appearing. Thus the total possible events would equal 6. If we were interested in a specific face, say 2 (and only 2), then the number of favorable events would be 1. Thus the probability of rolling a 2 would be equal to 1 divided by 6 or ⅙ or 16.67 percent or .17. If there were ten possible events and three favorable events, the probability would be 3/10 or .30. If all possible events are 'favorable', as they would be if you asked the chances of rolling some number from 1 to 6 with a die, the probability would then be 1.00. On the other hand, if there would be no favorable events, as there would be if you asked the chances of rolling a 22 with a single roll of the die, then the probability would equal .00. It should be obvious that the probability of an event

2. See, e.g., the statutes of California, Cal. Penal Code Sec. 190.2; Colorado, CRS 39-11-103(6); Ohio, Ohio Rev.Code, Ann. Sec. 2929.04; Pennsylvania, 18 Pa. S. Sec. 1311 (d). See also the statutes of Indiana, Ind. Ann.Stat. Sec. 10-3401(b); Louisiana, 14 L.S.A. Sec. 30; Oklahoma, 21 O.S.A. Sec. 701.1.

3. See H. L. Menken, ed., A New Dictionary of Quotations, New York, 1972.

4. Id.

5. Even if a degree of probability were specified, the contradiction inherent with the standard of proof beyond a reasonable doubt would remain, as would the due process problem of punishing for possible future conduct. Cf. Baker v. State, Tex.Cr.App., 478 S.W.2d 445, 448.

6. R. K. Young and D. J. Veldman, Introductory Statistics for the Behavioral Sciences, 2nd ed., New York, 1972.

522 S.W.2d—60

cannot be more than 1.00 (where all possible events are favorable) nor less than .00 (where no event is favorable.)."

Certainly this clear, yet technical, definition of probability, though without vagueness in the meaning of the term itself, leaves much vagueness in the issue submitted under Article 37.071(b)(2), because with this clear definition the question would by its terms be answered in the affirmative for all men, no matter how saintly, and no such intent can reasonably be attributed to the Legislature. We must recognize, then, that this least vague of definitions leaves the greatest vagueness in the statute.

Having rejected the common sense understanding and the technical definition as inadequate, let us examine the legal definition of "probability" to determine if it has a meaning sufficiently free of vagueness to give the notice required. In 72 C.J.S. Probability p. 968 we find the following definition:

"The word 'probability' implies consideration of probative facts, and in ordinary language it also implies *doubt*.

"• • •

"In the doctrine of chances, probability is the likelihood of the occurrence of an event, or the quotient obtained by dividing the number of favorable chances by the whole number of chances.

"In legal writings and opinions, '*assumption*,' '*inference*,' '*presumption*,' and '*probability*' have been said to have substantially the same meanings. . . ." (Emphasis supplied.)

As can be seen, this explanation leaves as much vagueness in the statute as we have found in either of our earlier considerations of the term.

Article 37.071 is so confusing that even the majority of this Court have been misled. They have not even addressed the vagueness inherent in Article 37.071(b)(2), and have failed to remove from my mind the vagueness of that issue upon which the operation of this mandatory statute pivots. I would hold the statute unconstitutionally vague in violation of Article 1, Section 10, Texas Constitution, and the due process clause of Amendment XIV, United States Constitution.

The invalidity of Art. 37.071, V.A.C.C.P., however, would not invalidate Article 1257, V.A.P.C., nor would it require reversal of this case. If Article 37.071 were held unconstitutional, as it should be, the only remaining punishment available under Article 1257(b) would be life. The proper disposition of this case, in light of the invalidity of the procedure for imposing the death penalty, would be to reform the judgment to provide for life imprisonment. See Haines v. State, Tex.Cr.App., 391 S.W.2d 58, 60 (on motion for rehearing).

I therefore concur in the affirmance of this conviction, but would reform the judgment to life.

ROBERTS, Judge (dissenting).

I dissent. The majority opinion fails to address the most crucial issue presented by this appeal. Because of the importance of this case, I set out the reasons for my dissent in some detail.

I.

I turn first to Art. 37.071(b)(2), Vernon's Ann.C.C.P., noting that this provision basing the imposition of capital punishment upon the probability of future events appears to be unique to this State. A survey of the capital punishment statutes of other states fails to reveal any provision similar to the "probability" issue of Article 37.071. In all the statutes reviewed, the aggravating circumstances upon which imposition of the death penalty rests concern either *prior* acts of criminal conduct or the means of circumstances surrounding the commis-

sion of the offense for which the accused is on trial.[1]

The threshold question in this appeal, as presented by appellant's first ground of error, is: What did the Legislature mean when it provided that a man's life or death shall rest upon whether there exists "a probability" that he will perform certain acts in the future? The question is not an academic one, since a significant part of appellant's challenge is that the phrase "a probability" is so vague and overbroad as to be unconstitutional, and that this overbreadth is compounded beyond logical and rational understanding by the statutory requirement that the stated "probability" must be proved beyond a reasonable doubt.

In view of this serious challenge to the statute now confronting us, it is incumbent upon this Court to determine whether it is possible to define the phrase "a probability." This the majority has not done.

Since the phrase "a probability" is not defined within Article 37.071 itself, a further search is necessary.

II.

I necessarily begin with an examination of the Code of Criminal Procedure itself. Article 3.01, V.A.C.C.P., requires this Court to construe all "words, phrases and terms used in this Code" in their "usual acceptation in common language, except where specially defined."[2]

However, we must also be guided by the Texas Code Construction Act, which applies to any amendment to our Code of Criminal Procedure enacted by the 60th or any subsequent Legislature. Art. 5429b-2, Sec. 1.02(2), Vernon's Ann.Civ.St. (Supp. 1974); Barbee v. State, 432 S.W.2d 78, 82 (Tex.Crim.App.1968), cert. den. 395 U.S. 924 (1969). Since Article 37.071, as noted earlier, was enacted in 1973 by the 63rd Legislature, it falls within the province of the Code Construction Act. Section 2.01 of the Code Construction Act, which is clearly more specific than Art. 3.01, V.A.C.C.P., supra, is as follows:

> "Words and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.[3]

A careful reading of this language compels me to conclude that if there is a "technical or particular meaning" of the phrase "a probability," we are bound to construe that phrase accordingly.

I find that there is a widely accepted "technical definition" of the word probability.

Webster's[4] gives a typical example of this definition:

> "In the doctrine of chance, the likelihood of the occurrence of any particular form of an event, estimated as the ratio of the number of ways in which that form might occur to the whole number of ways in which the event might occur in any form (all such elementary forms being assumed as equally probable): the limit of the ratio of the frequency of that form of the event to the entire frequency of the event in all forms as the number of trials is increased indefinitely. Thus, as an unweighted die thrown up may fall equally well with any of its six faces up, there are six ways of happening; the ace can turn up in only one way; the chance of the ace is 1 out of 6 (⅙)."

Thus defined, a probability is simply a chance—however large or small—as measured and defined in mathematical or statistical terms.

Certainly this clear definition of probability, though without vagueness in the meaning of the term itself, leaves much vagueness in the issue submitted under Article 37.071(b)(2), because even with this definition *the question would by its terms, be answered in the affirmative for all individuals*, no matter how saintly. That is, there is beyond any doubt *some* mathematical chance that all persons "would commit criminal acts of violence that would constitute a continuing threat to society."

I doubt that such a definition and such a construction were intended by the Legislature. Further, I am ever mindful of the important rule of construction that statutes carry with them a strong presumption in favor of their validity. Art. 5429b-2, supra, Sec. 3.01(1); Ex Parte Wilson, 374 S.W.2d 229, 231 (Tex.Cr.App.1964); Delorme v. State, 488 S.W.2d 808, 811 (Tex.Cr.App.1973). I feel bound nonetheless by the requirement of Section 2.01 of our Code Construction Act, which requires us to adopt the technical meaning of the phrase, regardless of whether it has obtained that meaning "by legislative definition *or otherwise*."[5]

The conclusion is thus inescapable that the appellant's punishment was decided to a significant degree by the answer to a question which—as a result of its vagueness and overbreadth—*could not have been answered in his favor*. It is equally clear that such a procedure violates due process and thus constitutes error.[6]

III.

Nor can I conclude that the error was harmless. At the outset, it is clear that in enacting Article 37.071 the Texas Legislature responded to the Supreme Court's opinions in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), by putting strict limits on the jury's discretion in assessing the death penalty, but *not* by eliminating such discretion entirely. See Coley v. State, 231 Ga. 829, 204 S.E. 2d 612, 615 (1974). It is equally clear from the foregoing analysis of subsection (b)(2) of Article 37.071 that subsection (b)(2) allows no discretion whatsoever to the jury called upon to answer a special issue drafted in accord with its language. Such a special issue must always be answered "yes," and the statute is thus made more mandatory in the instant case

1. See, e. g., the statutes of California, Cal. Penal Code Sec. 190.2; Colorado, 21 CRS 39-11-103(6); Ohio, Ohio Rev.Code Ann. Sec. 2929.01; Pennsylvania, 18 Pa. S. Sec. 1311 (d). Also see the statutes of Indiana, Ind. Ann.Stat. Sec. 10-3401(b); Louisiana, 11 L.S.A. Sec. 30; Oklahoma, 21 O.S.A. Sec. 701.1.

2. Cf. Art. 8, V.A.P.C. (1925).

3. Compare Art. 10, V.A.C.S. (1969).

4. Webster's New International Dictionary of the English Language (2d Ed. Unabridged 1944), pp. 1970-1971, syl. 3; for other similar examples see: 2 Compact Edition of the Oxford English Dictionary (1971), p. 2309, syl. 3; Random House Dictionary of the English Language (Unabridged Ed. 1967), p. 1146, syl. 4.

5. I have strong reservations about any construction which places technical definitions above common sense understanding. But my respect for the law and the institutional integrity of our state government requires me to yield to the clear intent of our Legislature, as embodied in the language of Section 2.01, supra. See Duncan v. Magette, 25 Tex. 245, 253-254 (1860). I would add that even with a common sense definition of probability, subsection (b)(2) has serious flaws. See the separate opinion of my brother Odom, as well as footnote 6, infra.

6. I have other, graver reservations about subsection (b)(2). Under this subsection we go beyond our traditional understanding of reasonable doubt, which is based on the defensible premise that where acts have been performed, they can be proven to have produced an incident beyond a reasonable doubt. This concept has been tried, tested, and proven valid.

But under subsection (b)(2) the jury is required to find beyond a reasonable doubt that an individual, the defendant, will *in the future* perform certain acts. This adopts the principle of predestination: That man is destined to do certain things and hence has no control over his actions. If this be true, we should not punish or attempt to rehabilitate, since the defendant is no more responsible for his acts than an individual who is insane at the time he commits an offense.

However, if individuals are responsible for their acts—as I believe—this cannot be true; yet if individuals are so responsible, (b)(2) is unconstitutional, since it is impossible to prove beyond a reasonable doubt or to a moral certainty that a person will act in a certain manner in the future.

by a factor of one-half. This was clearly not the intent of the Legislature. See the discussion of *Furman*, infra.

It must also be noted that a proper statutory construction of subsection (b)(2) substantially increases a defendant's chances of receiving the ultimate penalty. Thus, under such a construction, the appellant in this case was not, as he thought, confronted with two special issues, with the knowledge that a negative answer to either one of them would save him from the death penalty; he was instead faced with only one such issue, since a negative answer to special issue number two was by definition foreclosed. The appellant's actual chance of receiving the death penalty was therefore increased by one-half. Since the statute was 50 percent more mandatory than the appellant could have realized, I fail to see how he could *not* have been harmed.

The error clearly was not harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); consequently, the judgment should be reversed.

IV.

Justice under law requires that I not end this inquiry on such a note. It must next be asked whether this unconstitutional portion of Article 37.071 renders the entire statute invalid. Delorme v. State, supra.[7]

As noted earlier in this opinion, Article 37.071 was created by the 63rd Legislature as part of Chapter 426 of the Acts of that Legislature. Section 7 of that Chapter provides:

"If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable."[8]

Before we can determine whether a portion of an Act is severable, it is obvious that we must first be able to "give effect" to the remainder of the Act. I therefore turn to the issue of the constitutionality of Article 37.071, supra, Article 1257, supra, and the remainder of Chapter 426.

Appellant urges that Article 37.071 and Article 1257 violate the Eighth and Fourteenth Amendments of our Federal Constitution. Appellant specifically relies upon Furman v. Georgia and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

This Court stated in Lopez v. State, 500 S.W.2d 844, 846 (Tex.Cr.App.1973), that "the per curiam opinion and the nine separate opinions filed by the Justices of the United States Supreme Court, in *Furman* and *Branch*, leave much to be desired from the standpoint of clarity . . . ." An examination of those opinions reflects that while two of the Justices in the *Furman* "majority" would totally abolish the death penalty in this country, 408 U.S. at 257-306, 314-374, 92 S.Ct. 2726, the three other Justices voting to reverse limit their condemnation to the unfettered nature of the discretion given to judges and juries called upon to decide the issue. 408 U.S., at 240-257, 306-314, 92 S.Ct. 2726.[9]

7. In *Delorme*, this Court found a portion of Article 152, V.A.P.C., to be unconstitutional. We nonetheless held that the statute could be validly enforced by excising the offending portion. Delorme v. State, supra, 488 S.W.2d, at 811-812.

8. Even without this severability clause, it would be necessary to determine whether the invalidity of the subsection (b)(2) renders all of Article 37.071 invalid. See, Delorme v. State, supra, and cases there cited.

9. I also note that the four dissenting Justices concluded—for various reasons—that the death penalty was constitutional as currently applied by the various states. 408 U.S., at 375-470, 92 S.Ct. 2726.

In applying *Furman* to non-mandatory death penalty statutes like our own, the courts in some other states have—quite properly, I believe—looked to these three latter opinions for whatever guidance they dared to glean from *Furman*. See, e. g., Coley v. State, 231 Ga. 829, 204 S.E.2d 612, 614-615 (1974).

I especially agree with the Georgia Supreme Court's interpretation of *Furman*. In *Coley*, that Court convincingly concluded that *Furman* allows "for new legislation by the States permitting the exercise of some controlled discretion through the use of objective standards by which the sentencing authority may be guided in imposing the penalty of death." *Coley*, supra, at 615.[10]

After a careful examination, I have concluded that the remaining portion of Article 37.071—after the excising of subsection (b)(2)—provides for the type of controlled discretion and objective standards contemplated by the opinions in *Furman*. I would hold that the statute, minus the offending subsection, is constitutional and should be so enforced. Furman v. Georgia, supra; Delorme v. State, supra.[11]

Appellant also challenges other portions of the death penalty act. Along with the majority, I have concluded that the remainder of Chapter 426, like the unsevered segment of Article 37.071, is constitutional.

The judgment should be reversed and the cause remanded.

10. I also agree with the Georgia court's emphasis on new legislation. Like the Texas Legislature, the Georgia General Assembly enacted a new death penalty statute after the decision in *Furman*. A mere re-interpretation of a death penalty statute in effect prior to the decision in *Furman* might well be subject to a serious challenge as an ex post facto law. Cf. Commonwealth v. Harrington, 323 N.E.2d 895, 16 Cr.L. 2506, 2507 (Mass. 1975).

APPENDIX B

D. The Inconsistency Of The Death Penalty With Contemporary Standards of Decency

Eighth Amendment standards are not static, and the prohibitions of the cruel-and-unusual punishment clause are not "confine[d] . . . to such penalties and punishments as were inflicted by the Stuarts." Weems v. United States, 217 U. S. 349, 372 (1910). Instead, the clause is "progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice," Id. at 378, and informed by "the light of contemporary human knowledge." Robinson v. California, 370 U. S. 660, 666 (1962). There was no disagreement among the Justices who reached the issue in Furman v. Georgia that this evolutionary standard authorized the periodic Eighth Amendment re-evaluation of hoary criminal punishments. See Furman v. Georgia, supra, at 242 (opinion of Mr. Justice Douglas); at 264-269 (opinion of Mr. Justice Brennan); at 325-328 (opinion of Mr. Justice Marshall); at 383 (opinion of Mr. Chief Justice Burger); at 409 (opinion of Mr. Justice Blackmun); at 429 (opinion of Mr. Justice Powell). Such a re-evaluation of the penalty of death is particularly appropriate at this historical juncture, for three principal reasons:

First: The cruelty and inutility of the death penalty are apparent in an age when "contemporary human knowledge," draws upon advanced medical science and sciences of human behavior. We are no longer so uninformed about the complex sources and motivations of anti-social behavior as to maintain the simplistic and beguiling notion that the threat of death deters serious crime; nor can we ignore today the the truism that government remains "the potent, the omnipresent teacher" 46/ even when it chooses to

46/ Olmstead v. United States, 277 U. S. 438, 485 (1928) Justice Brandeis, dissenting).

teach the overriding lesson of capital punishment "'that a man's life ceases to be sacred when it is thought useful to kill him.'"[47] While we have not abandoned the essential moral and social proposition that the citizen is responsible to society for his or her conduct, new knowledge of the subtle springs of human behavior has led to a reconsideration of the justifications for retributive punishments,[48] a partial diminution of retributive sentiment, and a guarded, but increased optimism about the possibilities of rehabilitation. At the same time, society has developed sophisticated means for safely isolating dangerous criminal offenders.

To the extent that contemporary human knowledge casts doubt on the utility of capital punishment in achieving the legitimate aims of criminal sanctions, it casts doubt on the legitimacy of capital punishment in Eighth Amendment terms. If it cannot be established that the death penalty is a superior deterrent, and if it cannot be shown that the death penalty is necessary to isolate dangerous offenders, reinforce moral standards of (if retribution

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47/ Camus, Reflections on the Guillotine, in CAMUS, RESISTANCE, REBELLION AND DEATH 173, 229 (1961).

48/ ". . . a cloud of doubt has settled over the keystone of 'retributive' theory. Its advocates can no longer speak with the old confidence that statements of the form 'This man who has broken a law, could have kept it' had a univocal or agreed meaning; or where scepticism does not attach to the meaning of this form of statement, it has shaken the confidence that we are generally able to distinguish the cases where a statement of this form is true from those where it is not." H.L.A. Hart, PUNISHMENT AND RESPONSIBILITY (1968), at 1.

is considered a legitimate aim of penal sanctions) a civilized society's measure of justice, then it is surely impossible for any governmental organ to justify the decision made below by a single vote of the North Carolina Supreme Court: to "extinguish, after untellable suffering, the most mysterious and wonderful thing we know, human life."[49] Mr. Justice White wrote in Furman that:

> "The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment." 408 U. S. at 312.

At a time when the death penalty is and inevitably will continue to be rarely imposed, and when empirical data fail to substantiate that its imposition is "of substantial service to criminal justice" (id. at 313) in any case, the question is squarely presented whether death as a punishment for crime is consistent with any morality that our society can forthrightly accept.

Second: The rarity with which the death penalty is imposed today signifies repudiation of its regular use. The Court in Furman confronted an accepted system which sent an exceedingly small number of persons[50]--who were, for the most part, members of

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49/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 291 (1971).

50/ "The most salient characteristic of capital punishment is that it is infrequently applied . . . [A]ll available data indicate that judges, juries and governors are becoming increasingly reluctant to impose or authorize the carrying out of a death sentence." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND

powerless or despised minorities--to die in secret for crimes punished less severely in the vast majority of cases.[51]

> "[T]oday society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute." Furman v. Georgia, supra, at 300 (Brennan, J. concurring).

The Furman majority rightfully looked to what the public conscience will allow the law to do, as opposed to what it will permit the law to threaten. In the words of Mr. Justice Brennan, "The objective indicator of society's view of an unusually severe punishment is what society does with it." 408 U. S. at 300 (emphasis added). A punishment which is tolerated only because it is rarely imposed, or because the facts and circumstances surrounding its imposition and the evidence of its inutility are generally unknown, or because it is imposed only upon the powerless and members of outcast groups, is not a punishment consistent with contemporary morality. Even in those states which have enacted new capital punishment legislation since Furman, the imposition of the

50/ (Cont'd)

ADMINISTRATION OF JUSTICE, REPORT (THE CHALLENGE OF CRIME IN A FREE SOCIETY) (1967), p. 143.
The extent to which this is true appears upon inspection of the highly reliable figures on executions maintained by the Federal Bureau of Prisons since 1930. Of the 3,859 persons executed under civil authority in the United States between 1930 and 1968, only 191 were executed during the 1960's and only 25 were executed after 1963. No one has been executed in the United States since 1967. UNITED STATES DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, Bulletin No. 46, Capital Punishment 1930-1970 (August 1970).

51/ Justice Douglas quoted the conclusion of the President's Commission on Law Enforcement and Administration of Justice that "'the death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.'" Furman, supra, at p. 249. See also the concurring opinions of Justice Stewart, at p. 310, and Justice Marshall, at pp. 364-366. Justice Marshall noted that "American citizens know almost nothing about capital punishment." Indeed, ignorance of the details of execution is insured by law in that every American jurisdiction now

death penalty remains, and must continue to remain, a freakishly rare occurrence. Indeed, even in the State of North Carolina, where for fourteen months a purportedly "mandatory" death sentence was put into effect for four relatively common crimes, the number of death sentences was so low that it is impossible to conclude that the penalty was being in a fraction of the cases to which it was theoretically applicable. The legitimacy of its application in a manner which no honest mind can doubt will continue to be freakishly rare in this country--if it continues at all--is therefore called into question.

Third: The growing reluctance to allow the state to take the life of any human being and the absolute refusal to require or tolerate general application of the death penalty reflect not only an increased awareness of the inutility of the punishment, but also a moral development which has produced an increased respect for life and a concommittant revulsion against inflicting the physical and psychological torture of condemnation, inevitably lengthy death row confinement and execution.[52] Increased respect for

51/ (Cont'd)

forbids public executions. Movements to Abolish the Death Penalty in the United States, 284 ANNALS 124, 127-130 (1952).

52/ ". . . the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." SELLIN, THE DEATH PENALTY (1959) 15.

life and increased respect for the dignity of man inevitably increase the awesomeness of the notion of condemnation and execution. Thus executions, which were once routine occurrences, had ceased for a period of five years even prior to Furman as this nation agonized over the prospect of their resumption and over the inevitable and sobering possibility that human error or a denial of due process could send a man to his death.[53/]

The enormity of the process forbids its resumption without the prior judgment of this Court. If, after a lapse of seven years, the United States is going to return to killing people, this Court should first consider under the relevant Eighth Amendment standards all that that implies.

It is incontrovertible that an impending execution inflicts severe psychological anguish and mental pain upon a condemned man.

Under a legal system which postpones execution for periods measured in years in an attempt to assure its conformity with due process of law, the wait between the imposition of sentence and the actual infliction of death exacts a severe toll.

As the California Supreme Court has pointed out,"the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 894 (1972).

53/ See Black, "The Crisis in Capital Punishment" 31 MD. L. REV. 290, at 295-300 (1971).